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APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1970

No. 783

CASSIUS MARSELLUS CLAY, JR.,
also known as MUHAMMAD ALI,

Petitioner,

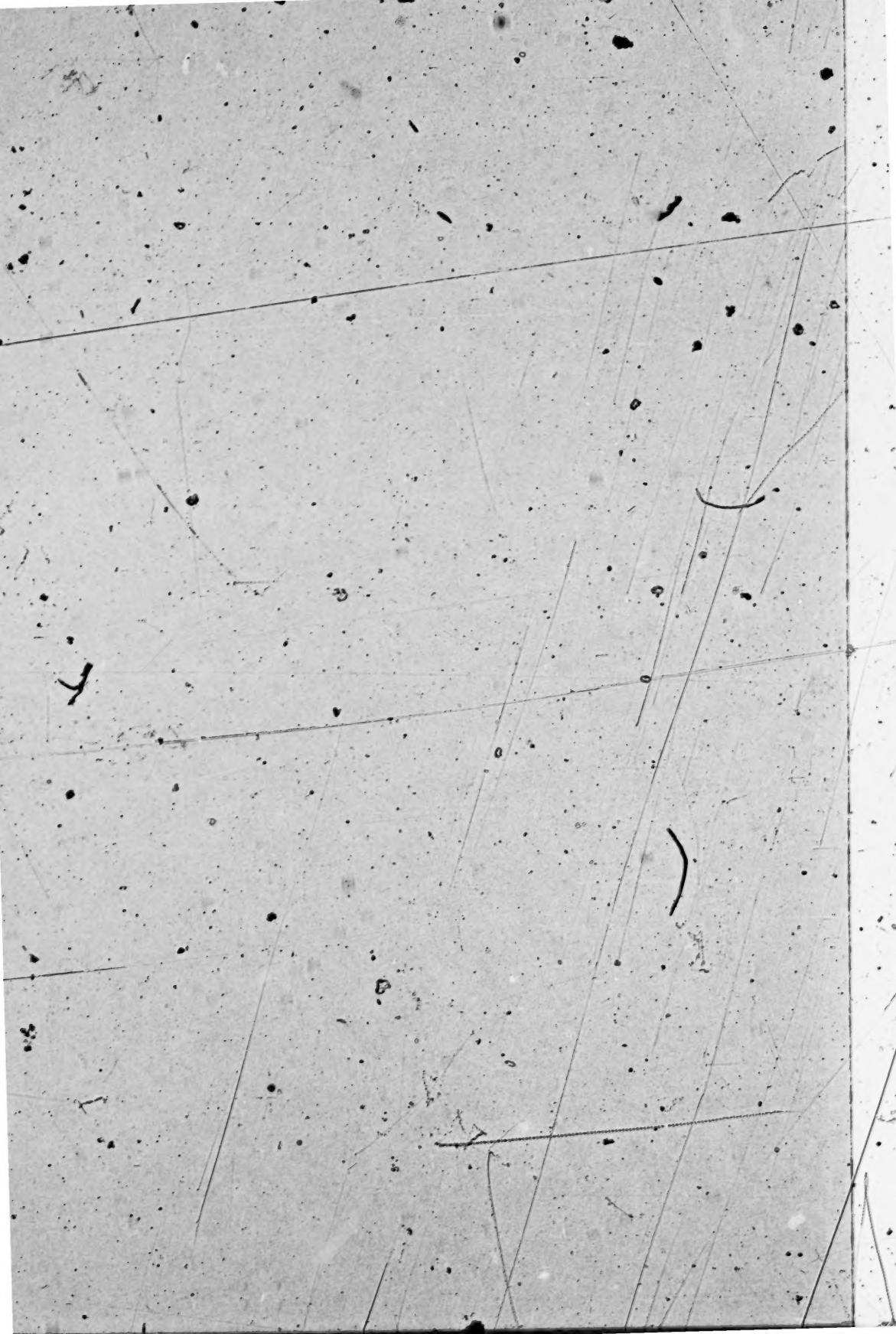
—v.—

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 1, 1970

CERTIORARI GRANTED JANUARY 11, 1971



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TESTIMONY AT SPECIAL HEARING

Registrant's Witnesses

Chauncey Eskridge—
Direct 24a

Samuel X. Saxon—
Direct 30a

Mrs. Cassius Clay, Sr.—
Direct 51a

Mr. Cassius Clay, Sr.—
Direct 55a

Cassius M. Clay, Jr.—
Direct 58a
By the Court 86a

Relevant Docket Entries

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

5- 8-67	INDICTMENT filed.
5- 8-67	ARRAIGNMENT: Plea of NOT GUILTY. Bond set at $5,000. Motions to be filed by May 18, 1967 (BCC).
6-19-67	Jury empanelled, sequestered and excused until 6-20-67 (JI).
6-20-67	TRIAL before jury (JI). Evidence heard—concluded. Argument of counsel. Charge of the Court. Verdict of GUILTY received.
6-20-67	Verdict filed.
6-20-67	SENTENCE. 3 YRS. and fine of $10,000 (JI). Deft continued on bond. To file notice of appeal and new bond on 6-21-67. (New bond to be in same amount and under same conditions).
6-21-67	Judgment and Commitment filed (JI). Process issued.
6-21-67	NOTICE OF APPEAL filed. (Copy handed to U.S. Attorney).
4-22-69	JUDGMENT (or Mandate) of U.S. Supreme Court, received and filed. (Judgment of District Court VACATED and cases REMANDED for further proceedings in conformity with Opinion of Supreme Court).
4-22-69	Opinion of Supreme Court received and filed.
6- 2-69	(JI) Defendant appeared with counsel. Motion of Q. Hodges to withdraw granted in open court. Government to file brief. Hearing reset.

Relevant Docket Entries

6- 4-69 (JI) Hearing resumed. Defendant's motion for discovery denied. Evidence heard.

6- 5-69 (JI) Hearing resumed. Evidence heard—not concluded.

6- 6-69 (JI) Hearing resumed. Concluded. Submitted. Briefs to be filed.

7-14-69 Memorandum of the court filed in duplicate (copies delivered to counsel) (denying Defendant's Motion to Dismiss).

7-24-69 (JI) SENTENCE: 5 YRS. and fine of $10,000.00. Defendant may remain at liberty under existing bond.

7-24-69 (JI) JUDGMENT AND COMMITMENT filed and entered. Process issued.

7-24-69 NOTICE OF APPEAL filed.

[7A]

Cover Sheet and Minutes

Minutes of Actions by Local Board and Appeal Board and on Appeal to the President

Dates		Vote Yes	Vote No
5–11–60	Birthdate verified B. of V.S.		
1–19–62	mailed SSS 127 (cur. info. quest.)		
3– 9–62	Class. 1-A	3	0
3–12–62	mailed SSS 110 (notice of class.) Order for armed forces phys. exam.		
11– 4–63	mailed. SSS 223 (Nov. 21, 1963)		
11– 4–63	mailed SSS 127 (cur. info. quest.)		
11–27–63	papers transmitted to L.B. 5, N. Y. for phys. exam.		
12–26–63	papers transmitted to Transfer Bd. 46, Miami, Florida for phys.		
3–18–64	papers returned from phys. exam.		
3–20–64	file transmitted to Ky. State Hdqts		
3–24–64	file returned		
3–26–64	Class. 1-Y	3	0
3–30–64	mailed SSS 110 (notice of class.)		
1–13–65	mailed SSS 127 (cur. info. quest.)		
1– 5–66	papers sent to examining station for determination as to eligibility for service		
2– 3–66	papers returned—acceptable		
2– 3–66	mailed DD 62 (statement of acceptability)		

Cover Sheet and Minutes

SELECTIVE SERVICE SYSTEM
MINUTES OF ACTION—CONTINUATION SHEET

NAME OF REGISTRANT OR STANDBY RESERVIST: Clay, Cassius Marsellus

SS OR SR NUMBER: 15 47 42 127

Dates	Minutes of Actions	Vote Yes	Vote No
2-17-66	Class. 1-A	4	0
2-17-66	Class. 1A-Acc	4	0
2-18-66	mailed SSS 110 (notice of class.)		
2-18-66	mailed SSS 150 (Special Form for Conscientious Objector)		
3-17-66	Class. 1-A Class. 1A-Acc	4	0
3-21-66	mailed SSS 110 (notice of class.)		
3-22-66	Board Members gave permit for extending Appeal Period for 30 days		
[11A]			
3-28-66	Letter of Appeal from registrant received		
4-19-66	Supplemental Papers of Appeal received		
4-21-66	File transmitted to Ky. St. Hdqts for forwarding to Appeal Board. Letter to Cassius Clay and copy of letter to Mr. Edward W. Jacko, Jr. (attorney) advising file being forwarded to Appeal Board.		
5/6/66	File reviewed by Board of Appeal and it is tentatively determined that		

Cover Sheet and Minutes

SELECTIVE SERVICE SYSTEM
MINUTES OF ACTION—CONTINUATION SHEET

NAME OF REGISTRANT OR STANDBY RESERVIST: Clay, Cassius Marsellus

SS OR SR NUMBER: 15 47 42 127

Dates	Minutes of Actions.	Vote Yes	Vote No
	the registrant should not be classified in Class 1-O or in a lower class. [Signatures omitted]		
1–10–67	file returned from appeal Board Class. 1A 3-O		
1–10–67	mailed SSS 110 (notice of class.) & SSS 111 (Class. advice) to Hayden C. Coyington, New York.		
1–12–67	File presented to Bd. Members at meeting at 1:30 p.m. Members reviewed, but classification was not reopened. retained in 1A which Appeal Bd. classified	4	0
Jan. 19, 1967	Class 1A At the written request of General Lewis B. Herschey, Director of Selective Service, pursuant to Section 1625.3(a) of the Selective Service Regulations Local Board No. 47 did re-open and consider anew the classification of the Registrant, Cassius Marcellus Clay. After re-examining the file of said registrant and the records thereon, upon discussion		

Cover Sheet and Minutes

SELECTIVE SERVICE SYSTEM
MINUTES OF ACTION—CONTINUATION SHEET

NAME OF REGISTRANT OR STANDBY RESERVIST	SS OR SR NUMBER
Clay, Cassius Marsellus	15 47 42 127

Dates	Minutes of Actions	Vote Yes	Vote No
	and due dilberation said Local Board No. 47 upon a 3-0 vote did classify said registrant, Cassius M. Clay as 1-A	3	0
	[Signatures omitted]		
[12]			
1-19-67	mailed SSS 110 (notice of class.) & SSS 111 (Class. advice) to Hayden C. Covington, Esq. Jackson Heights, New York		
1-26-67	Letter of appeal received from registrant		
1-31-67	mailed file to Ky. State Selective Service Headquarters, Frankfort, Ky. for forwarding to appropriate appeal Board in Houston, Texas.		
2-20-67	File returned from Appeal Board Houston, Texas		
2-20-67	mailed SSS 110 (notice of classification) & SSS 111 (Classification advice) to Hayden C. Covington, Esq. 34-44 76 St. Jackson Heights, New York 11372		

Cover Sheet and Minutes

SELECTIVE SERVICE SYSTEM
MINUTES OF ACTION—CONTINUATION SHEET

NAME OF REGISTRANT OR STANDBY RESERVIST	SS OR SR NUMBER
Clay, Cassius Marsellus	15 47 42 127

Dates	Minutes of Actions	Vote Yes	Vote No
2–20–67	File forwarded to Ky. St. Hdqts.		
3– 1–67	Letter sent to registrant advising him that his complete file had been forwarded to the National Selective Service Appeal Board, on an Appeal taken by General Lewis B. Hershey, Director.		
3– 6–67	Classified 1-A by National Appeal Board	3	0
3–14–67	File returned from National Appeal Board.		
3–14–67	SSS Form 110, Notice of Classification, mailed to registrant, advising him of decision of National Appeal Board.		
3–14–67	SSS Form 111, Classification Advice, mailed to Mr. Hayden C. Covington, Esq., 3444 76th Street, Jackson Heights, New York, advising him of National Appeal Board's Decision.		
3–14–67	SSS Form 252, Order to Report for Induction, mailed. Date of Reporting April 11, 1967. Copy sent to Mr. Hayden C. Covington. SSS Form		

Cover Sheet and Minutes

SELECTIVE SERVICE SYSTEM
MINUTES OF ACTION—CONTINUATION SHEET

NAME OF REGISTRANT OR STANDBY RESERVIST	SS OR SR NUMBER
Clay, Cassius Marsellus	15 47 42 127

Dates	Minutes of Actions	Vote Yes	Vote No
	127, Current Information Questionnaire; DD Form 398, Statement of Personal History & Instructions; & DA 41, Work Sheet, also mailed with Order to Report for Induction, to the registrant.		
3–27–67	SSS 230 (Transfer for Induction received—mailed DD forms 47 & Hospital records to Transfer Bd. 61, Houston, Texas Mailed SSS 390 requesting above forms to be completed.		
5– 2–67	Papers returned from transfer Bd. 61, Houston, Texas. with letter attached showing that registrant refused to submit to Induction on April 28, 1967. The Kentucky State Director, Col. Taylor Davidson, determined that the registrant should be reported to the United States Attorney for prosecution.		
5– 2–67	SSS 301 (Delinquent Registrant Report) was mailed to the State Director for transmittal to U. S. Attorney		

[13]

February 14, 1966 Letter

[Original letter in Selective Service File is handwritten, Letterhead omitted.]

Re: Muhammad Ali
also known as Cassius Marsellus Clay
and Cassius X Clay.

Selective Service No. 15-47-42-127

Presently residing at 46-10 N.W.
15th Court, Miami, Florida

Former mailing address—(Permanent.)
7307 Verona Way, Louisville, Ky.

To: Chairman, Local Board No. 47
Louisville, Kentucky

Dated: February 14, 1966

Title: Change of Status Notice
Request for pre-reclassification Hearing

Gentlemen:

It is requested that you accept and consider the follow changes of fact relating to my Selective Service Classification submitted herewith supple-[524] menting and amending information heretofore filed with the local board.

1. My occupation is professional boxer and I am at present the Heavyweight Champion of the World. I won this title on February 25, 1964 and have defended the same on two occassions previously; and I am presently under contract to defend this title a third time on March 29, 1966 in the City of Chicago, State of Illinois. If successful on this defense I am deep in negotiations for a further defense in a foreign country, England, possibly in May of this year. A great interest has been claimed for this American

title to be defended in London, England, and possibly other European Countries. That my mail is heavy with invitations to fight or defend my title or just to appear in many African and Asiastic countries, my name being Muhammad Ali and I am not adverse to such invitations. There is only truly one world recognized Heavyweight Champion of the World and that is me. [525]

2. That on August 14, 1964 I was married and on January 11, 1966 a divorce decree was entered in my favor in the Circuit Court of Dade County, Florida, on the ground that my wife had failed to comply as per a pre-marital agreement with the tenets of my Muslim faith. The decree, however provides that I pay her alimony monthly in the sum of $1,250.00 for the period of 121 months subject to her remarriage or death, and that the sum of $50,000.00 in two installments be posted or secured this year to be applied from my last fight receipts and my next fight in March. This is an appealable decision. Time to appeal ends March 11, 1966.

3. That my mother is also a dependent and I have been and still am her sole source of support. Her name is Odessa L. Clay, of 7307 Verona Way, Louisville, Kentucky. [526]

3. That I am a devoit Muslim and a follower of the Islamic religious faith under the discipline of the Prophet Eligah Muhammad. To bear arms or kill is against my religion and I conscientiously object to any combat military service that involves the participation in any war in which the lives of human beings is taken. This I do not believe to be rightous. This has been my faith upward of 5 years.

In January and February or March of 1964, I was rejected on pre-induction tests and examination by the Armed

February 14, 1966 Letter

Forces. I states my position in this regard and on religious ground to the authorities testing me, the results of which test to the best of my knowledge being I was rejected by the Armed Forces authorities in Washington on the psycological basis that I was untrainable for military service. My condition has not been changed to my knowledge to the present time.

4. That contrary to published news reports and Army Releases of my previous physical examination I was in fact not completely examined physically.

5. That about November 13, 1964 I suffered an unexplained Inguinal hernia believed of a chronic nature for which I was operated on in Boston, Mass. [527]

6. That on December —— 1965, I was arrested in the City of Chicago and taken into police custody on a charge Disorderly Conduct the specifics of which I am not clear about. Bail was set and paid but I was and I believe I am now subject to criminal jepardy and required to return for trial in the City of Chicago, State of Illinois. The case to my last knowledge is set for jury trial sometime in March of 1965.

7. I did not receive and until I heard on the radio and read in the paper that I was in Selective Service Class 1-Y. I did not know what that meant until last February 11, 1966, when it was explained to me. I do not recall even before receiving a Form DD62 before the one I saw dated 26 Jan. 66 which I saw for the first time on Monday February 12, 1966. (This, however, may be due to an inefficient secretary whom I fired for misconduct in July, 1964, when I returned from my quest tour of a number of African States.) [528]

/s/ Muhammad Ali Slave Name Cassius M. Clay, Jr.

[517] **SSS Form 150**

Received 2-28-66

[Original form in Selective Service File is filled out in handwriting.]

SELECTIVE SERVICE SYSTEM

SPECIAL FORM FOR CONSCIENTIOUS OBJECTOR

[EMBLEM]

Selective Service
Local Board No. 47
Room 106, VA Bldg.
1405 W. Broadway
Louisville, Ky. 40203
(Local Board Stamp)

THIS FORM MUST BE RETURNED
ON OR BEFORE
Feb. 28, 1966
(Ten days after mailing or issue)

Date of mailing or issue Feb. 18, 1966

1. Name of Registrant:
   Clay Cassius Marsellus
2. Selective Service No.:
   15 47 42 127
3. Mailing address:
   46-10 N. W. 15 Court Miami, Florida

[INSTRUCTIONS OMITTED]

SERIES I.—CLAIM FOR EXEMPTION

INSTRUCTIONS.—The registrant must sign his name to either statement A or statement B in this series but not to both of them. The registrant should strike out the statement in this series which he does not sign.

(A) ~~I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form. I, therefore, claim exemption from combatant training and service in the Armed Forces.~~

.....
(Signature of registrant)

(B) I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form and I am further conscientiously opposed to

participation in noncombatant training and service in the Armed Forces. I, therefore, claim exemption from both combatant and noncombatant training and service in the Armed Forces.

Slave Name	Right Name
/s/ Cassius M. Clay, Jr.	/s/ Muhammad Ali

Under the provisions of section 6 (j) of the Universal Military Training and Service Act, as amended, any person who claims exemption from combatant training and service in the Armed Forces of the United States because he is, by reason of religious training and belief, conscientiously opposed to participation in war in any form and such claim is sustained by the local board, shall, if he is inducted into the Armed Forces, be assigned to noncombatant service as defined by the President, or shall, if found to be conscientiously opposed to participation in such noncombatant service, in lieu of induction, be ordered by his local board, subject to regulations prescribed by the President, to perform for a period of twenty-four consecutive months such civilian work contributing to the maintenance of the national health, safety, or interest as the local board deems appropriate, and any such person who fails or neglects to obey such order of the local board shall be subject to imprisonment for not more than five years or a fine of not more than $10,000, or to both such fine and imprisonment.

Series II.— Religious Training and Belief

Instructions.—Every item in this series must be completed. If more space is needed use extra sheets of paper.

1. Do you believe in a Supreme Being? ☒ Yes ☐ No

2. Describe the nature of your belief which is the basis of your claim made in Series I above, and state whether or not your belief in a Supreme Being involves duties which to you are superior to those arising from any human relation.

Muslim—meaning peace—total submission to will of Allah—Do not take lives of anyone; nor war when not ordered by Allah (God)—Keep up prayer and pay poor rates.

SSS Form 150

[518]

3. Explain how, when, and from whom or from what source you received the training and acquired the belief which is the basis for your claim made in Series I above.
From hearing Ministers of Islam in Miami, Fla.; reading the Holy Quan—(Muslim Bible) and teachings of Hon. Elijah Muhammad; Attend as often as possible in Miami, Fla. and Chicago, Ill.

4. Give the name and present address of the individual upon whom you rely most for religious guidance.
The Hon. Elijah Muhammad—4847 Woodlawn Ave. Chicago, Ill.

5. Under what circumstances, if any, do you believe in the use of force?
Only in sports and self defense

6. Describe the actions and behavior in your life which in your opinion most conspicuously demonstrate the consistency and depth of your religious convictions.
I divorced my wife whom I loved because she wouldn't conform to my Muslim faith. Gave up my Christian name and changed my name to Muhammad Ali, my religious name. Declined movie roles not consistent with my faith.

7. Have you ever given public expression, written or oral, to the views herein expressed as the basis for your claim made in Series I above? If so, specify when and where.
Yes. Many times on Radio, TV and everywhere

[Series III.—General Background OMITTED]

[519]

Series IV.—Participation in Organizations

Instructions.—Every item in this series must be completed. If more space is needed use extra sheets of paper.

1. Have you ever been a member of any military organization or establishment? If so state, the name and address of same and give reasons why you became a member.
No

2. Are you a member of a religious sect or organization? ☒ Yes ☐ No. If your reply to item 2 is "yes," complete items (*a*) through (*e*).

SSS Form 150

(*a*) State the name of the sect, and the name and location of its governing body or head if known to you.
Muhammad's Mosque No. 29. Miami Fla
" " " 2 Chicago Ill

(*b*) When, where, and how did you become a member of said sect or organization?
Jan 1964. Miami Fla, Confession of faith

(*c*) State the name and location of the church, congregation, or meeting where you customarily attend.
Miami Fla. 17th & 57th Ave
Chicago, Ill. 5335 Greenwood Ave.

(d) Give the name, title, and present address of the pastor or leader of such church, congregation, or meeting.
Hon Elijah Muhammad 4847 Woodlawn Ave. Chicago Ill Minister Lucius, Muhammad Mosque 29 Miami Fla

(*e*) Describe carefully the creed or official statements of said religious sect or organization in relation in participation in war.
Islam teaches Peace—Allah (God) forbids wars, except when Islam is attacked. Holy Quran.

3. Describe your relationships with and activities in all organizations with which you are or have been affiliated, other than military, political, or labor organizations.
Member, believer and Follower.
[520]

Series V.—References

Instructions.—This series must be completed. If more space is needed use extra sheets of paper.

Give here the names and other information indicated concerning persons who could supply information as to the sincerity of your professed convictions against participation in war.

Name	Full Address	Occupation or Position	Relationship to You
Odessa Clay	7307 Verona Way Louisville, Ky.		Mother
Elijah Muhammad	4847 Woodlawn Ave, Chicago, Ill.		Minister

SSS Form 150

REGISTRANT'S CERTIFICATE

INSTRUCTIONS.—Every registrant claiming to be a conscientious objector shall make this certificate. If the registrant cannot read, the items and his replies thereto shall be read to him by the person who assists him in completing this form. If the registrant is unable to sign his name he shall make his mark in the space provided for his signature in the presence of two persons who shall sign as witnesses.

NOTICE.—Imprisonment for not more than five years or a fine of not more than $10,000, or both such fine and imprisonment, is provided by law as a penalty for knowingly making or being a party to the making of any false statement or certificate regarding or bearing upon a classification. (Universal Military Training and Service Act, as amended).

I, Muhammad Ali, certify that I am the registrant named and described in the foregoing statements in this form; that I have read (or have had read to me) the statements made by and about me, and that each and every such statement is true and complete to the best of my knowledge, information and belief. The statements made by me in the foregoing is not in my own handwriting.

Registrant sign here → /s/ Muhammad Ali

Slave Name
Cassius M. Clay Jr
2-28-66

If another person has assisted the registrant in completing this form, such person shall sign the following statement:

I have assisted the registrant herein named in completing this form because He asked me to write this as he stated it to me.

/s/ Edward W. Jacko, Jr.
Attorney at Law
271 West 125th Street
New York, N. Y.

Record of Personal Appearance

[482]

M-40

Registrant: Cassius Marsellus Clay
SS Number: 15-47-42-127

RECORD OF PERSONAL APPEARANCE

1. Was written Request for Appearance filed? Yes
2. Date of Local Board Meeting: March 17, 1966
3. Names of board members present: Mr. J. Allan Sherman, Mr. M. M. Dilley, Mr. Robert Rickert & Mr. Frank Wolking
4. Names; Identification of parties appearing: Cassius Marsellus Clay
5. Requesting change in classification from 1-A to until
6. Was written information filed? Yes
7. Following is a concise summary of oral information as reported by parties appearing:

Requested appearance because he felt he had been incorrectly classified 1-A from 1-Y because he had previously failed his armed forces physical exam, and then without any order to be re-examined was classified 1-A. (Board Members advised that standards of Army had been lowered, his papers sent to examining station for review and found qualified.) Requested appearance and appeal based on above fact and, also, hardship. Hardship—taking care of

* Reverse side of sheet or additional sheet of plain paper may be used to complete summary, if needed.

Record of Personal Appearance

parents and payment of alimony to former wife. He is no longer Cassius Clay, since that was a slave name, but has taken the name of Muhammad Ali.

His religion teaches them not to take part in any way with infidels or any non-religious group. They fight only in self defense, not war. Boxing is considered his livelihood. They are taught to pray 5 times a day facing the East. They abstain from certain foods as lobster, shrimp, crab, pork, corn-bread and no liquor or smoking.

They are taught to respect only Civil laws, such as traffic.

Their religion or group has their own police force and no muslim may carry any lethal weapon. Mohamid is their leader.

Clay objects to being in service because he has no quarrel with the Viet Cong.

Clay stated that he could not, without being a hypocrit, take part in anything such as war or anything that is against the Moslim religion.

He still loves his former wife, but she would not conform with Moslim requests.

I certify that the information shown in Item 7 above was submitted verbally by the person(s) listed in Item 4.

This 21 day of March 1966.

/s/ M. Green
Clerk, Local Board No. 47

March 28, 1966 Letter

[Stamp]

[Original letter in Selective Service File is handwritten.]

Selective Service
Local Board No. 47
Room 106, VA Bldg.
1405 W. Broadway
Louisville, Ky. 40203

Rec 3-29-66

Toronto, Canada
March 28, 1966

Local Board No. 47
1405 Broadway
Louisville, Kentucky

Re: Appeal to Appeal Board
Selective Service Classification
No. 15-47-42-127.

Cassius M. Clay, Jr. a/k/a
Muhammad Ali

Present residence:
73-07 Verona Way
Louisville, Ky.

Gentlemen:

This is my appeal to the Appeal Board from the recent re-classification of myself from 1-Y to 1-A and affirmed on March 17, 1966, mailed to me on March 21, 1966,. The appeal is taken upon the entire file and from each and every decision failing to give sufficient weight to the facts stated in my letters dated February 14, 1966 [478] March 17, 1966 and my concientious objection based upon religious

training and belief statement and questionaire filed on February 28, 1966.

More specifically I submit on this appeal the following matters in which I believe the local board was in error:

1. That following my rejection from military service by the Secretary of the Army Stephen Ailes, who personally made the final decision to reject me for draft duty in April, 1964, purportedly based upon two written tests and the report of findings of time evaluated psychological studies of my case, I was re-classified by the Local Board 1-Y. No subsequent testing of me occurred. On February 17, 1966, my classification from 1-Y to 1-A was directed by the Local Board, with knowledge of the facts that: (a) 29 F.R. 155561, dated November 20, 1964, provided that 1-Y registrants be such as, ". . . not eligible for a lower class. . . . *found* under applicable physical, mental and [479] moral standards to be not *currently* qualified for service in the Armed forces. . . ." [italics added]. On November 13, 1964, I was examined for and underwent surgery at Boston City Hospital for a congenital right inguinal incarcerated hernia which had descended into the scrotum, a disqualifying defect for service in the armed forces; and a defect for which a lower classification was warrented lower than Class 1-Y., possibly IV-F. However, without any individual review of my case at the level of my prior rejection, or other manner of "current qualification" testing for service in the Armed Forces, I was summarily and arbitrarily transferred to Class 1-A, ostensibly to satisfy a pressure clamor aimed at certain athletes who were still working their professions in private life; and as (b) as stated in my letter of March 17, 1966, the pre-emption of this re-classification form 1-Y to 1-A was contrary to 29 F.R. 15561, where as a class 1-Y registrant

March 28, 1966 Letter.

I would not [480] and should not has been "qualified for such service" . . . only ". . . in time of war or national emergency declared by Congress." No war or national emergency having been declared by the Congress to date, it is submitted that my re-classification to 1-A is therefore illegal and unconstitutional.

2. As pointed out in my conscientious objection statement my religious beliefs decree that I not serve in any military purpose to promote war. I reaffirm my stand thereon as my prior duty to Allah (God) the Supreme being over all.

3. My divorce and the property settlement decreed therein was based on a settlement agreement for $151,250.00 which I am and will be bound to pay. This is true despite Soldiers & Sailors Civil Relief Act, where the amount was predicated on my 1965 earnings and a deferred draft classification. My mother is also my dependent.

Yours truly,

/s/ Muhammad Ali (Slave Name Cassius M. Clay, Jr.)

[481]

Transcript of Special Hearing

[268]

[References in brackets in transcript are to pages of the original Selective Service File]

LOUISVILLE, KENTUCKY

SPECIAL HEARING

IN RE:

Selective Service Classification of:
Cassius M. Clay, Jr., a/k/a
Muhammad Ali.,
S. S. No. 15-47-42-127

BEFORE:

HONORABLE LAWRENCE GRAUMAN

August 23, 1966

The above-styled matter, coming on for Hearing, before the Honorable Lawrence Grauman, on Tuesday, August 23, 1966, at about the hour of 2:00 P. M., in the United States District Courtroom No. 2, Sixth & Broadway Streets, Louisville, Jefferson County, Kentucky, the following proceedings were had and done, to-wit:

Judge Grauman: Now, Mr. Covington, in the directions given to me, as Hearing Officer, I note that should the public or press indicate a desire to attend any Conscientious Objector Hearing scheduled by the Hearing Officer, the Hearing Officer is requested to [269] ascertain from the Registrant, or his counsel, whether the Registrant has any objections to the presence of the press or public during the proceedings and if the Registrant has any objections, the Hearing Officer should request him to state such objections in writing and, in such event, the press and public

should be excluded from the Hearing or, if the Registrant fails or refuses to state the objections in writing, a notation that he objects shall be made in his presence in the record of the proceedings and the press and public shall be excluded.

So, I would respectfully request of you and the Registrant to please state whether or not there is an objection to the public hearing and if there is, will you please sign a writing and the Hearing will be private.

Mr. Covington: Your Honor, I have discussed this matter with the Registrant, Muhammad Ali, Mr. Clay, and it is our opinion and desire not to make it public and he is ready and willing to sign the necessary written statement to that effect. I am preparing it at this moment.

Judge Grauman: All right; please file it with the Reporter.

(At this point the aforesaid document was received by the Reporter.)

[270] Judge Grauman: Whenever you are ready, Mr. Covington. Now, I would like to apply the rule for the separation of any witnesses.

Mr. Covington: That is understandable and satisfactory, Your Honor.

Judge Grauman: All right, sir. Any witnesses other than Mr. Clay who are going to testify will be conducted by the marshal to the witness room.

Mr. Covington: Your Honor, we are going to put on a member of the Bar first.

Judge Grauman: Yes, sir; and then call the other witnesses. Now, of course, after they testify, Mr. Covington, they may stay in the courtroom.

Mr. Covington: Yes, Your Honor. We will put Mr. Eskridge on first.

Chauncey Eskridge—for Registrant—Direct

[271] MR. CHAUNCEY ESKRIDGE, called as a witness by the Registrant, was examined and testified as follows, to-wit:

By Mr. Covington:

Q. Mr. Eskridge, would you please tell His Honor, Judge Grauman, your address, your residence address and your business address, your occupation— A. I live at 6416 South Park Avenue, Chicago, Illinois, and I am an attorney at law, licensed to practice in the State of Illinois.

My office address is 123 West Madison Street, Chicago, Illinois.

Q. And you are a member of the Bar and for how long have you been so? A. Since 1950.

Q. And in what field of law, if any, do you specialize? A. The field of Federal Taxation.

Q. Do you know the Registrant, Muhammad Ali, also known as Cassius Clay, Jr.? A. I do.

Q. How long have you known him, sir? A. Since August, 1964.

Q. And what was the occasion of your becoming [272] acquainted with him? A. I was at that time retained by him to be his legal advisor in tax matters.

Q. Now, what has been the nature of your association and the extent of it since that time to date? I ask this for the purpose of showing, Judge Grauman, what if any, basis you have for the statements of opinion and other matters related to his claim. A. Prior to the time I met the Registrant I had been doing legal advice—giving legal advice and tax advice to the Honorable Elijah Muhammad so that I was familiar with the Honorable Elijah Muhammad since about 1950.

Q. Who is the Honorable Elijah Muhammad? A. He is the leader of Muhammad'd Mosque.

Q. And that is otherwise known as the Nation of Islam? A. It is.

Q. And what connection, if any, does the Registrant have with that organization? A. He is a member, first missionary, and he is a minister.

Q. Right.

Judge Grauman: You say he is a [273] minister?

The Witness: Minister.

Q. Minister of the organization? A. Yes.

Judge Grauman: (Spelling) M-I-N-I-S-T-E-R?

The Witness: Yes.

Judge Grauman: Would you mind telling me what a minister of the organization—what position that is, please?

The Witness: Within the Nation of Islam?

Judge Grauman: Yes, sir.

The Witness: A minister addresses congregations; he meets with groups; he seeks converts.

Q. Now, would you please relate to the Judge in your own words, the history of your acquaintance with him in this respect as a member of the Nation of Islam? A. I—when I met him in August, 1964, he had recently become active in the—the Nation, whereupon, it was my job as a tax consultant with him, to stay as close to him as possible to manage and advise as to his financial affairs.

As a result, I have had quite close contact with [274] him.

Q. Now, incidentally, are you a member of the Nation of Islam faith? A. I am not.

Q. You have been rendering professional services only and attending to business matters and that is the extent of your association, is it not? A. No, that is not.

Q. No, it isn't? Now, what additional association have you had with the Registrant? A. I have had occasion, many times, to go to temple with him. Prior to my having met him I attended temple at—at various temples around the country. I have been with him when he engages in what is called "Fishing".

That is an engagement whereupon the Registrant goes on the street and especially on Sunday mornings and he seeks to find people along the street whom he seeks to induce to go to temple with him that day.

Q. Now, in addition to that, you have also had association with him as his tax consultant, have you not, Mr. Eskridge? A. I have.

Q. Now, has Muhammad Ali ever had occasion to express his opinions or his scruples or objections, if [275] any, in respect to the participation in combat, or non-combatant service in the Armed Forces? A. He has.

Q. And could you give us any of the substance about that, or substance of a statement of what he has— A. (Interrupting) The first time the subject arose between the Registrant and myself was in Chicago on a day he had been invited back to Chicago by the Illinois Boxing Commission where they wished to hear his views, and this was the first time that the two of us had this conversation.

His conversation arose about the fact that he knew that I was an inactive military officer and he was—

Q. (Interrupting) What service are you attached to in the reserves? A. I am a Lieutenant-Colonel in the Stand-by Reserves, United States Army.

Q. Yes. A. And he said to me what would I think if

he should choose to enter the penitentiary rather than accept military service, and my answer to him was that, "If conscience requires that you do this, then I am with you."

Q. Now, based on the discussions and the [276] knowledge that you have of the Registrant, Muhammad Ali, could you give Judge Grauman any opinion as to the bona fides of his objections and whether they are—whether they extend to the performance of combatant or non-combatant military service? A. The clearest example of his bona fides interest in his religion is evidenced by the cleavage that resulted between himself and his spouse which ripened into a divorce in January, 1965.

The cleavage resulted because of his insistence on his spouse—that she follow the dictates of Islam. So insistent was he that she follow these tenants that he was willing to give her up by way of divorce and to pay the alimony which was entered by agreement in order that he may be able to live an example and that anyone around him be an example of what he believes in.

That would be my first impression of the bona fides of his believe—his beliefs.

Secondly, I have noted that a man who has earned as much money as he has since winning the title in January, 1964, where the natural attractions of persons who have access to money which we, in America, believe to be the successful use of money—to the Registrant, the use of money in the temptation to use it to show success in [277] monetary means has been refused by him. He does not cherish the use of money for the purpose of displaying wealth.

He has an humbleness which, though he is the Champion, and the Champion is required to stand in a fashion and a posture that would make him look like a champion, yet he has an humbleness that makes him different.

He has the trait and characteristics of a man who can encourage persons whom he seeks to induce his religious belief—he has that capacity so to do.

I have always noticed that the Registrant has refused to eat the types of food that persons—that he could afford, the entertainment that he could afford; this he has refused to do.

Q. Thank you. Now, could you elaborate on, if you know, specifically about the opportunities that he had which he turned down to make money on contracts, such as records, recordings, or in the movies, and other endorsements of other products and other things that he turned down on account of his faith? A. In the early part of—let me say it this way: soon after having won the first fight against Liston in January, 1964, there were opportunities offered to him at that time to make endorsements of commercial— [278] commercial endorsements of products which are sold on the market, and at that time he was asked, because the rumor had just started, "Are you a member of the Nation of Islam?", and his answer was, "What difference does it make? Does it mean that you will not ask my endorsement if I am a member of the Nation of Islam?", and the answer was in the affirmative and he refused to disavow his membership in the Nation.

Q. Now, specifically, have you ever seen Muhammad Ali do any of what is called "Fishing" work as a part of his evangelistic ministerial activity not for the purpose of showing that he is a minister, but establish his good faith as a conscientious objective? A. Many occasions; I know of several occasions, and recently where he has been working with a teen-age gang—groups, in Chicago; this I know of.

I know, and I have been with him as he went along the street and sought members to go with him on Sunday. This—I have been with him in Miami when he has done this and in Chicago and in New York.

Q. Have you ever been around him when he has been attempting to do anything in respect to diminishing or retarding juvenile delinquency, and tell what, if anything, he has done in that respect as a part of his religion? [279] A. As a part of his religion, I've seen him meet with the organization known in the Nation as the Fruit of Islam. The Fruit of Islam are the young members of the followers of the Honorable Elijah Muhammad, and in the Fruit of Islam there is an encouragement to maintain physical fitness, and he lends himself in these groups of the Fruit of Islam around the country.

He goes and he encourages and demonstrates and engages in the physical activities that are going on to encourage the Fruit of Islam to maintain their physical fitness.

I might add, however, and in addition, that to become a member of the Nation of Islam requires a very strict code of conduct. The code of conduct requires that a man always look that—as if he—he's sure of himself; that is to say, he is clean; his shirt is white; his tie is dark maroon, or dark blue; he is clean-shaven; his hair is cut close; his language is circumscribed; his conduct is circumscribed; he does not eat deleterous foods which have pork products in them; he doesn't engage in the drinking of alcohol or the taking of nicotine; and to the women, they do not wear cosmetics.

Q. Could you say that the claim of the Registrant has been made to the Draft Board in good faith? [280] A. It is, in my opinion, made in good faith.

Samuel X. Saxon—for Registrant—Direct

Mr. Covington: I believe that is all. That is all from this witness, Your Honor.

Judge Grauman: Call your next.

Mr. Covington: May Mr. Eskridge remain in the courtroom now?

Judge Grauman: Yes, he may remain; yes, sir.

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[281] Mr. Samuel X. Saxon, called as a witness, by the Registrant, was examined and testified as follows, to-wit:

By Mr. Covington:

Mr. Covington: Your Honor, this witness does not swear, but affirms.

Judge Grauman: Well, I think under the regulations the procedure is very informal; witnesses are not sworn.

Mr. Covington: Fine, Your Honor; thank you.

Judge Grauman: Now, let us make sure. These are the instructions to the Hearing Officer. The Hearing, contemplated under the Act, was to be in the nature of an administrative proceeding and shall be informal, non-technical and flexible. Care should be exercised to avoid any resemblance to a judicial proceeding or a prosecutive action and in no sense shall the Registrant be deemed to be on trial. The ordinary rules of evidence shall not apply. The Hearing Officer is not authorized to subpoena witnesses or to administer oaths.

Mr. Covington: That's right.

Judge Grauman: Consequently, the testimony of voluntary witnesses will not be sworn.

[282] Mr. Covington: Fine; thank you, sir.

Judge Grauman: Yes, sir. Now, may I have—you are Samuel X. Saxon. Is that this gentleman's full name?

The Witness: Yes, sir.

By Mr. Covington:

Q. Now, Mr. Saxon, would you please tell His Honor, Judge Grauman, your full name—well, I mean, you've already given that. I mean your age and your residence address and business address and your occupation? A. Your Honor, I am—my name is—

Q. (Interrupting) Please talk a little louder, Mr. Saxon. A. My name is Samuel X. Saxon. I am Assistant Minister and Captain of Muhammad's Mosque No. 29, in Miami, Florida, and my age is thirty-four years old, and I am the distributing manager of the Muhammad Speaks newspaper in Miami, Florida. I'm the circulation manager.

Q. Now, I'll ask you whether or not you know the Registrant, Muhammad Ali, also known as Cassius Clay? A. Yes, sir; I know him.

Q. And for how long, or what period of time [283] have you been acquainted with the gentleman? A. I met Muhammad Ali early part of 1961, to know him as a person.

Q. Now, tell the Judge the circumstances? A. Judge, on the circumstances, I met Muhammad Ali I was walking up Second Avenue in Miami selling our Muhammad Speaks Newspaper and by him seeing me selling the Muhammad Speaks Newspaper, he heard the teachings of the Honorable Elijah Mumammad in the past and he came over and we went to talking about the teachings of Honorable Elijah Muhammad and then he carried me to his room to show me how he had won the A.A.U. Championship,

the Golden Gloves—not the Golden Gloves,. and the Olympic there, and I told him at that time that I had been keeping up with him in the Olympics games, and we had so much in common at that time.

So, after meeting him at this time I invites him to the Mosque and he come to the Mosque and he listened to the teachings and he was so enthused over the teachings 'till he used to just talk it all the time, up and down the avenues, and I used to try to stop him at that time because he wasn't in the fold with us at that time, and so this went on for years and years and I encouraged him to attend more and he did.

[284] Eventually, he got to be a full-fledged member of the teachings of the Honorable Elijah Muhammad.

Q. And do you know anything about his opinions or statements of opinions as to the performance of combatant or non-combatant military service? A. Repeat that, please, sir?

Q. Do you know anything about—that is to say, have you ever heard him say anything about his objections to serving in the Army either combat, or non-combatant? A. Yes, sir. Well, he believes as I believe. I mean, from me and him talking with one another, he believes as I believe, that he shouldn't take no part in war.

Q. And are you familiar with the teachings of the Honorable Elijah Muhammad, a part of the Nation of Islam, in respect to the performance of military service? A. Yes, sir.

Q. And could you tell His Honor, Judge Gráuman, the substance or the essence of those objections? A. Yes, sir; Your Honor, we are taught and we believe that us being righteous people, and trying to do the divine will of

Almighty God, that we believe we shouldn't take part in wars or participate in them.

[285] Q. And is this one of the main, of fundamental teachings of the group of the Nation of Islam? A. Yes, sir; this is the teachings of the Honorable Elijah Muhammad. He have it on the back page.

Q. You have mentioned the newspaper Muhammad Speaks. Would you show—would you hand that to me? A. Yes, sir.

Q. I would like, if I may, if it please Your Honor, to hand it to you and ask that it be considered as—especially the back page, and that it be received, Your Honor.

Judge Grauman: Yes, sir; we will let it be filed as a part of the record.

Mr. Covington: For what it may be worth; yes, sir.

Judge Grauman: Yes.

Q. Now, that newspaper, Muhammad Speaks, you say you have distributed on the streets and that you were distributing it when you first got acquainted with Muhammad Ali? A. Yes, sir.

Q. Now, have you ever seen Muhammad Ali engage in the distribution of this paper? [286] A. Yes, sir; he—he distribute those too at times, in different cities.

Q. And have you ever heard Muhammad Ali engage in what is known as "Fishing"? A. Oh, yes.

Q. And explain to the Judge what that means? A. Judge, Your Honor, "Fishing" means that one who believe in the teachings of the Honorable Elijah Muhammad and religion of Islams, he's so enthused over it 'till he will go out in the street and try to get other people to believe

as he believe because he sees the benefits that he's getting from believing in the teachings.

So, "Fishing" is when one have this type of understanding and he will go out and tell people about what he have learned of himself, which, in the past, he don't know himself, and this give the man the enthusiasm to go out and "fish" the people to the teachings of the Honorable Elijah Muhammad so they can try to understand as he understands and Muhammad Ali is one of the greatest "Fishermens" we have.

Q. And in this part of the "Fishing" work the end result of it, is it not, is to bring them, the interested persons to the meeting places? [287] A. Yes, sir; this is—this is the purpose of it.

Q. Yes, sir. A. And the—to teach them knowledge of themselves, and one who does this is called field ministers, ones that will be out and do this to the extent where he's not afraid or not ashamed to do this.

Q. Is Muhammad Ali a field minister engaged in this work? A. Yes, sir; yes, sir; he would qualify as a field minister, because—

Q. And does he do it regularly and customarily? A. Oh, yes, sir; he do. He does it quite often, sir.

Q. And have you heard him or seen him make any talks or give speeches in the mosques? A. We have him every time he's in Miami; we have him to teach our people; teach what he have learnt and the benefits that he have received from believing in the teachings of the Honorable Elijah Muhammad. He does this all the time.

Q. Now, before I get to some other matters that relate to other things I would like to ask you whether [288] or not, in your opinion, the objections of Muhammad Ali are conscientious against the performance of military service? A. Do I believe what, sir?

Q. Do you believe that his objections are conscientious and honest? A. Yes, sir.

Q. And are they based on the teachings of the Honorable Elijah Muhammad? A. Yes, sir; his understanding of his teachings.

Q. And I have shown you the resume of the Inquiry of the F.B.I. that was—a copy of which was mailed to Muhammad Ali, and I would like to direct your attention to a statement that occurs on page twenty-two, or rather, twenty-one:

> "He recalled that when he saw a press report that the Registrant had purchased a gun, he went to the Registrant and the Registrant explained that he purchased it more or less as a toy."

Were you the person, or gentleman that made that report to the F.B.I.? A. Yes, sir.

[289] Q. Well, please explain to Judge Grauman the circumstances, and tell him the reason why—what you found out as a result of your conversation with Muhammad Ali as to the reason he got it and then what was done? A. Judge, Your Honor, I was at home looking at the six o'clock news and I heard over the sports news that Muhammad Ali had purchased a pistol from a Local Pawn Shop, and as I heard this, I rushed over to his house and asked him, you know, why he would do a thing like that and he said, "I just bought it for a toy, to play with it. I bought some blank cartridges. I just like to have a little fun with it," and then at that time, me being a Captain of the Mosque, I had to tell him that we didn't encourage—we didn't even carry firearms period, and we didn't even have them in our homes because we believe in peace.

Our everyday greetings with one another is. "Peace", and religion name is "Peace", and I explained these things

to him and then I taken the gun from him and I threw it in the Atlantic Ocean in Miami, Florida.

Q. What kind of a gun was it? A. Oh, it was a little twenty—a little derringer, like, you know; a one-shot that's what it was, a one-shot.

Q. Was it—could you demonstrate the size [290] of it? A. Oh, it was about like this (indicating) a one-shot; break it over—break it over forward and put one shot in it.

Q. And did he resist that, or what? A. No, sir; after—after I told him these things he gave it to me without any opposition.

Q. Now, I direct your attention to what appears on page twenty-two of that report and first, I'd like to ask whether you are familiar with all of the teachings of the Nation of Islam; I mean, all of the basic teachings? A. Yes, sir; I am.

Q. Of the Nation of Islam; and before I move into that subject, you have mentioned that you were a Captain and I would like to have you explain to His Honor, Judge Grauman, what is meant by a "Captain"? A. Judge, Your Honor, a Captain in a Mosque is one who enforce the rules and the law of the Mosque and say, like, if we have rules and regulations that we go by, being on time, doing our duties of a righteous man and I am to see that these things are carried out, and like people gets lax in attending, I'm the man that go—go to them and find out what their trouble is; if they're sick, or is [291] they hurt, or is they hungry, or out of work and I'm to encourage them to get jobs when they are out of work and to not to be a beggar, and not to, you know, look for some relief to take care of them.

I'm the man that goes to them to encourage them to get up and do things for themselves and this is a part of my

duties as a Captain, to help them if they need help and to try to keep them encouraged and to stand strong and righteous and be righteous people.

Q. Now then, since you are familiar with the basic teachings of the Nation of Islam I would direct you to what appears in the Resume of Inquiry on page twenty-two, a xerox copy of which I have handed you where it appears that:

"Members owe no allegiance to the United States."

A. That's an untrue statement, sir.

Q. Is that a part of the teaching of the Nation of Islam? A. We—we do hold allegiance to the United States. We pay taxes. We obey all of the laws of the land. I think that's allegiance. We don't break no laws of the land. In fact, we are dismissed when we break laws of the land and I think that fits under the category [292] of allegiance.

Q. Now, is there anything in any of the publications of that Nation of Islam that makes such a statement, or advocates such a doctrine of "owe no allegiance to the United States"? A. No, sir; we don't teach this, period.

Q. All right. Now then, going farther down that paragraph it says:

> "Concerning the Fruit of Islam, it is characterized as a group within the Nation of Islam composed of male members of the Nation of Islam and the purpose of the Fruit of Islam is to protect officials and property of the Nation of Islam, assure compliance with what is then a part of the teachings of the Nation of Islam and to prepare for the War of Armageddon."

Does that mean, or is it a part of the doctrine that the Fruit of the Nation of Islam take any overt act, or any

acts to arm to prepare for the Battle of Armageddon? A. No, sir.

Q. Just what does that mean, "what is then a part of the teachings of the Nation of Islam"? [293] A. To the Fruit of Islam that means that all scriptures that we have been taught out of the Bible and the Holy Qur'an that the final war will be the War of Armageddon, and the Fruit of Islam is taught to prepare for the War of Armageddon of being on the right side of God which is righteousness.

We are preparing for that and we do take military training, drill, judo, because we do protect our property and officials of—ministers—we protect our ministers; we protect the Honorable Elijah Muhammad and we don't have no arms, no guns and no knives, no bayonettes, and to do this, we practice military training, judo, wrestling and karate.

Q. And you have no weapons of warfare then? A. No, sir.

Q. But what are the teachings of the Nation of Islam then in respect to self defense? Do you believe in self defense? A. Yes, sir.

Q. And do you believe in the War of Armageddon? A. Yes, sir; we certainly believe in it.

Q. Is that a war that the Nation of Islam will fight, or is it a war that someone else will fight? [294] A. No, sir; the—the Nation of Islam would not fight the War of Armageddon. We believe that God and the devil will fight this war and God need no help from me to fight this war. He just wants me to be righteous, from my understanding.

Q. Now, it says that the Fruit of Islam is governed by a military system wherein the members are controlled by general orders similar to those issued by regular military organizations. I ask you whether or not this is not true.

of most all religious organizations, that they refer to them as christian soldiers and use military terms? A. Yes, sir.

Q. Now, on page twenty-seven of the Resume of Inquiry, at the bottom of the page, there is a quotation from the Louisville Times, dated February 19, 1966, which refers to page 135 of the book, The Eternal Message of Muhammed, and I'll ask you whether or not that quotation is a quotation from the Honorable Elijah Mahammad, who is the leader of the Nation of Islam, or is it a quotation from some other person named Mohammed? A. Sir, this quotation is not of the Honorable Elijah Muhammad; this is not.

Q. Well now, what is it? [295] A. This is a quotation of someone who wrote a book on Mohammed of fourteen hundred years ago and if—maybe I should read it.

Q. Yes, I wish you would. A. So the Judge could understand what I'm talking about. It reads as follows:

> "The Message of Mohammed; considers warfare admissible and a virtue when undertaken to repel aggression against the weak, be it against an individual, or a group, in the interest of erecting the edifice of justice desired by God on earth. The prophet devoted himself to the repulsion of tyranny as did his successors, inasmuch as he commanded the authority of the Islamic policy to get the aggressors and avert tyranny. It followed therefore, that an Islamic State may ally itself with one or more states to defend a victim."

which this statement itself proves that this is not the Honorable Elijah Muhammad's words, because this is Islamic policies and his successors did this and Muhammad—the Muhammad we are following today do not have successors. He is here now.

Q. Is this not a writing by a former head [296] of an Islamic Nation or State? A. This is the writing of Mohammed of fourteen hundred years ago which—who had a State and which—who had an army and these were his words. These are not the words of the Honorable Elijah Muhammad.

Q. Have these words ever been adopted by the Nation of Islam as a part of their beliefs? A. No, sir.

Q. Then that has no relationship whatever to the beliefs of the Nation of Islam or the beliefs of Muhammad Ali in this case, does it? A. No, sir; because what Mohammed of Fourteen hundred years brought to their people, it couldn't fit us today because we are Fourteen hundred years away from that and what he taught his people, it's no use of us today and we—we don't follow this at all here.

Q. Well now, what do you folks—what book do you follow? What books for publication, if any, do you follow as a basis for the belief that the Nation of Islam have, or the objections that Muhammad Ali has expressed in his papers filed with the Draft Board and which you have expressed to Judge Grauman here? A. I think we could find them in the Holy Qur'an and this book we've got here, Message to the Blackman, [297] written by Honorable Elijah Muhammad.

Q. May I see them please? A. Yes. I think—

Q. (Interrupting) You have handed me a book entitled Message to the Blackman, in American, by Elijah Muhammad, and another book entitled The Holy Qur'an, English translation.

Now, are these two books on which—are these the two books on which the faith of the Nation of Islam in the United States is based? A. Yes, sir; this is what we follow, sir.

Q. Is that— A. Yes, sir.

Mr. Covington: May it please Your Honor, I'd like to offer the book entitled Message to the Blackman in America as one exhibit and the Second one, The Holy Qur'an—

Judge Grauman: (Interrupting) Who is the second one by?

Mr. Covington: It is by—may it please the Court, I will read—

The Witness: Maulana Muhammad Ali.

Judge Grauman: Is he living now?

Mr. Covington: Yes, the—

[298] The Witness: (Interrupting) Your Honor, the Honorable Elijah Muhammad, as we people who are strayed away from Islam for over four hundred years, he recommended this edition to us to study out of, more so than any other book—he recommend this to us.

Q. That's the Honorable Elijah Muhammad, now who— A. (Interrupting) Yes, sir.

Q. (Continuing)—recommended this as the basis for study? A. Yes, sir.

Mr. Covington: Now, Your Honor, I am reading from the publication leaf of the book, which is entitled The Holy Qur'an, Arabic Text, English Translation and Commentary, by Maulana Muhammad Ali, Fifth Edition, and published in Lahore, Pakistan, and this edition, the Fifth Edition, is 1963, and I offer each—offer the book.

Judge Grauman: All right.

Q. Now, does the Nation of Islam base any of its teachings upon the doctrine as stated in this paragraph at the bottom of page twenty-seven? A. No, sir.

Q. Of the Resume? A. No, sir.

[299] Q. And is that a part of the beliefs of the Nation of Islam in the United States? A. No, sir.

Q. Is that rejected? A. This is rejected. See, we don't have no state to defend; that's why it have to be rejected.

Q. Explain to the Judge why it is that the Muslims believe in the right of self defense and not in war; is there a difference, participation in war and— A. (Interrupting) Yes, sir; the self defense, Your Honor, we don't believe in war, and self defense, we believe that if we are attacked, or fight is forced on us, then we will defend ourselves because we believe we have no life after death so we must protect and defend ourselves so we can keep on living.

We, if you note, that a Muslim never take part in a demonstration in the street whereas fighting and killing is going on. So, we are peaceful people and we keep ourselves away from these things. I think that's a good difference between war and war is when you voluntarily fighting someone, and defend—when you are defending, you are defending your life, your home, your family.

Q. Now that you have mentioned about demonstrations in the street, there has been a lot of [300] publicity in the newspapers about this and what is the position of the Nation of Islam in respect to these public demonstrations that have drawn so much attention to the Nation? A. Your Honor; we are taught to not take no parts in—whether white and black are fighting one another—we are not to take any part in these things. We are to stay home and stay away from these things. This is what we are taught;

to not take any part in no forceing of ourselves on someone or taking part in any fight, and street fights, bottle throwing, gas throwing, we don't take no part in these types of things and we are instructed—I am instructed to tell the followers in Miami not to take part in them and stay home, stay in the house and so we are—we are seeking peace.

Q. Now, at one or two points in this Resume, reference is made to Muhammad Ali having adopted a religion of hate. I will ask you whether or not the religion of the Black Muslims, as they are commonly called in the public and press, or the Nation of Islam, as it refers to itself, believes in hate? A. No, we don't.

Q. Or practices hate? A. We don't practice no hate, sir.

[301] Q. Well, explain now to Judge Grauman the basic doctrine that the organization has on segregation? A. Segregation, we don't like segregation and we don't like—we are not in love with integration. We are trying to be a group of people that want to do something and stand on our own feet and produce for our nation of people just like your nation have produced for your people.

This is our teaching; to do something for yourself, be yourself, your own, accept your own. These are our teachings. This is why we take no part in demonstrations. We want something for ourselves and we want to be men to do it for ourselves and protect our women and children and not be segregated. That's a—my understanding—that's something that's forced on people. Those are some of our views on it.

Q. And do you believe in forced integration? A. No, sir; we believe that if the hotel will let me stay downtown that it's a good hotel. I've got the money to do this, to go in there, I go in there, but if the hotel man downtown say, "No, you can't come in here; you a negro, a black man,"

I said, "Thank you, sir," and I'll go back and go to some hotel we can go to. This is what we are teaching. This is what we believe.

[302] Mr. Covington: I believe that is all, Your Honor.

Judge Grauman: Are you Samuel Christopher Saxon?

The Witness: Yes, sir; that was my middle name. I never use that, sir.

Q. Would you explain to the Judge why it is that the organization of Islam, the Nation of Islam, use these different names, because the Judge has brought that up. Now, so that he will not have to guess at it, you explain it to him. A. Yes, sir. Well, Judge, Your Honor, when we say Samuel X. Saxon, well, Saxon was the name of my slave master that had my people hundreds of years ago and this name was passed down to me as I was birthed in the world and after I learned a knowledge myself that I'm wearing someone's name, so, we use the "X" to nullify the Saxon, but since we got to be identified as something, so we say Samuel X. Saxon, and the "X" let the world know that I'm no longer Saxon.

Judge Grauman: What is your legal name?

The Witness: My legal name?

Judge Grauman: Yes, sir.

[303] Judge Grauman: Are your also known as Samuel Shabazz?

The Witness: Samuel Shabazz; this is my Islamic name, Shabazz.

Q. Explain the meaning of Shabazz? A. Shabazz mean the first tribe or people that was on the Planet Earth. Shabazz is the God's tribe of people on the Planet Earth. We believe that Almighty God—Allah belonged to this tribe.

Judge Grauman: When did you first become associated with the Muslims?

The Witness: Back about ten year ago, sir.

Judge Grauman: What was your occupation before then?

The Witness: I was working in a machine shop in Los Angeles.

Judge Grauman: Now, when did you say you first met Mr. Clay, the Registrant?

The Witness: I—the early part of '60-'61, sir.

Judge Grauman: Where did you meet him?

The Witness: In Miami, Florida, [304] sir, around Second Avenue.

Judge Grauman: Did you prior to that time, meet him in Chicago when the Registrant came up to the Muslim Headquarters?

The Witness: Well, sir, at that time I met him in a by-way, not where we really got acquainted, sir. It was just a pass-through and we—we really didn't get acquainted at that time.

Judge Grauman: In Chicago?

The Witness: Yes, sir.

Judge Grauman: Do you remember the first occasion when you saw him in Chicago?

The Witness: Well, I remember him coming by, coming from the room, and he had heard so much of the teachings of the Honorable Elijah Muhammad that he wanted to come by and see the works of the

Honorable Elijah Muhammad and see the school and that's the time I saw him.

Judge Grauman: That was before you were assigned to Miami?

The Witness: Yes, sir.

Judge Grauman: Now, can you give us the names of any people who have been influenced by the Registrant when the Registrant has gone on these "Fishing" [305] expeditions?

The Witness: Could I do what, sir?

Judge Grauman: Can you give us the names of any of the people—you say the Registrant has been one of the most active persons going out on these "Fishing" expeditions?

The Witness: Yes, sir.

Judge Grauman: Can you give us the names of any of the people that he has gotten to join the Muslims?

The Witness: Yes, sir; I can give you names. I know a brother in Miami, named Eddie 2X. I have to find his slave name out because we just about forgot about slave names, you know, after a while, so, Eddie 2X and a brother named Robert 5X, in Miami, another one named Robert 4X—all these are members now.

Judge Grauman: But you can't give us their legal names?

The Witness: Well, sir, I have to go back and check records, because, as I say, we—

Q. Would you be willing to check records? A. Yes, sir.

Q. And then write a letter in to Judge Grauman? [306]

A. Yes, sir, Judge, Your Honor.

Judge Grauman: Now, you say that he is a field minister who devotes considerable time to these fishing expeditions?

The Witness: That's all he do, sir, when he's not training or fighting; it's all he do.

Judge Grauman: How many people would you say all told, through the efforts of the Registrant Clay have been influenced to become Muslims?

The Witness: Well, I only can speak for Miami, sir, and I think that in Miami that he have at least twenty people in our Mosque that he was influential in bringing in our Mosque.

Judge Grauman: If I understand, he just went out on the street and didn't know these people?

The Witness: Talked to them, yes.

Judge Grauman: He talked to them and influenced them to become members of the Mosque?

The Witness: And throughout the country the number is much greater than that, I know.

Judge Grauman: Now, I noticed in this Resume referred to by Mr. Covington, there is a statement that the purpose of the Fruit of Islam, among other things, is to prepare for the War of Armageddon. What do [307] you—what are you and the other members going to do when this war comes?

The Witness: Sir, just be right and try to be on the side of God.

Judge Grauman: Well, are you going to fight?

The Witness: No physical fight, no, sir.

Judge Grauman: What kind of preparations are you making? Are you making or taking military training for the war?

The Witness: Well, sir, as I explained, why, we take training and exercises to protect our mosques, our meeting places, our religion, our meeting places throughout the country. We don't bear no arms, so we have to be in some type of physical condition to protect our mosques.

Judge Grauman: Well, this statement about preparing for the War of Armageddon; if you are preparing, aren't you preparing to participate in the war?

The Witness: No, sir; we are not. We only preparing to be righteous and be on God's side, for him to have mercy on us.

Judge Grauman: Well, what part is [308] that going to be in the war?

The Witness: Well, this—we are not going to take no part in the war. God going to fight the war.

Judge Grauman: Then, if I understand correctly, this statement in the Resume of the F.B.I. is wrong?

The Witness: Yes, sir; if he thinks we are going to take part in a war.

Judge Grauman: Now, not about thinking you are going to take part, but this statement referred to by Mr. Covington which I had read to you that the purpose of the Fruit of Islam is to protect officials and property of the Nation of Islam, assure compliance of members with the Nation of Islam teachings and prepare for the War of Armageddon. Members of the Fruit of Islam are required to participate in military training and afforded the opportunity to engage in judo training. Now, is that a correct statement?

The Witness: Everything is correct there but

preparing for the War of Armageddon. The only thing we prepare for War of Armageddon is to be righteous. We're not preparing to attack no one.

Judge Grauman: Well, what is the [309] purpose of having a military and going through military tactics?

The Witness: Well, this is healthy; this conditions a man's body and mind.

Judge Grauman: You regard the ordinary calesthenics as being part of the military drill, do you?

The Witness: Yes, sir.

Judge Grauman: And in using this expression, "military drill", as I understand it, you are not referring to the procedures used by the Army?

The Witness: Well, drill—drilling is calling a bunch of men out. We go out in the field and run, get our bodies in condition. We put this under the classification as drill. The judo training, that's drill. Karate, that's drill. Even if you get some left faces and right faces, that's drill. This make a man stand up straight. This is why we do it.

Judge Grauman: Well now, you made a statement that the War of Armageddon is regarded as the final war.

The Witness: Well, the Bible speaks of it as being the final war.

Judge Grauman: And that is the view [310] of your organization?

The Witness: Yes, we believe it to be the final war between right and wrong.

Judge Grauman: Now, in this Resume—you have looked over this Resume, haven't you?

The Witness: Yes, sir.

Judge Grauman: There is some reference in there that some of your meetings you are referring to the people as "white devils". Could you explain that?

The Witness: Well, white devils could be anyone that do devilish things to any people, any group of people.

Judge Grauman: Well, is the viewpoint that only the people who do devilish things are white people or could they be Orientals, or—

The Witness: (Interrupting) Well, anyone do evil is a devil, whether he black, green, red or white.

Judge Grauman: Is there any particular reason why there is reference to white devils?

The Witness: Well, Your Honor, like Muhammad tells you that of the treatment that we have received under the white people and all is the act of a [311] devil.

Judge Grauman: What is the basis of teaching that you shouldn't engage in non-combatant service?

The Witness: Well that's banning any.

Judge Grauman: Administering to those who are injured and hurt in participating in a war; are you all prohibited from doing that?

The Witness: Yes, sir.

Judge Grauman: All right, sir.

By Mr. Covington:

Q. This one point, again, I want to underscore, is what you have told His Honor, Judge Grauman, the training for the protection of the mosques and churches in the Nation of Islam and the people of Islam is not in preparation for the war of Armageddon is it? A. No, sir. We—we train and get ourselves in shape because there is so much

violence going around and see, subject to be attacked any time, and history—where it's happened and we have been attacked.

Q. This training is only as a part of your religious belief of self-defense; is that right? A. Yes, sir; yes, sir.

[312] Q. And it is not for preparation for any kind of military action is it? A. No, sir.

Q. This Resume states on page twenty-seven that the article, that is, the article of the Courrier-Journal of February 19, 1966, says it is recorded that many muslims have served in the Army.

What is the view of the organization on that? Is this or is it not true or just what is the view of the Muslim Organization on that? A. I can't—I cannot say whether that's true or false. I say if a Muslim who was following the Honorable Elijah Muhammad did participate in war, well, that was him. I cannot speak for him. That's what he's doing and this is something he wasn't conscientious objective of. Maybe he didn't understand it the way I understand it. That's the only thing I can say on that, Your Honor.

Mr. Covington: I believe that's all.

[313] Mrs. Cassius Clay, Sr., called as a witness, by the Registrant, was examined and testified as follows, to-wit:

By Mr. Covington:

Q. Please state your name and your address and what your occupation is, whether as a housewife, or you have some occupation other than that? A. My name is Mrs. Cassius Clay, Sr. I live—

Mrs. Cassius Clay, Sr.—for Registrant—Direct

Q. (Interrupting) Please talk a little louder, ma'am, so that the Judge can hear you? A. My name is Mrs. Cassius Clay, Sr., and I live at 7307 Verona Way, and I'm a housewife.

Q. And the name of your husband? A. Cassius Marcellus Clay, Sr.

Q. Senior; and are you the mother of Muhammad Ali, formerly known as Cassius Clay, Jr., is that not correct? A. That's right.

Q. Now, Mrs. Clay, would you tell Judge Grauman what religious faith Muhammad Ali was raised up in, or the Registrant was raised up in? A. Well, he was raised up a Baptist.

Q. Now, what do you know about his changing [314] his faith? I mean, what facts led up to it, and you can just tell it in your own words so that I won't have to ask you any questions; how it came about that, as far as you know, he changed his religious faith from the Baptist to the Islam faith? A. Well, as far as I know, he told me he had gone to one of the Muslim Temples and he liked that faith and so he joined it. He liked it; he thought it was right and he joined it.

Q. Now, when you learned about this did you make any effort to change him or dissuade him or stop him from stepping away from the Baptist faith to the Nation of Islam? A. Yes, I did.

Q. Tell the Judge about that, please? A. Well, I told him that I raised him as a Baptist and I wanted him to stay one, but he told me after going to the temple and hearing about Islam and that it was the true, real religion, and he liked it and he believed in it and it was true and he was not going to change and he was going to stay in it because it was the—

Q. What is it that you have noticed in his life since he's joined the Nation of Islam that establishes his sincerity in reference to conversation or [315] the life that he has with other people his age, and that sort of thing? A. Well, since he joined Islam, well, he seems to be interested in knowing about that and he doesn't take any part in no kind of social activities, nothing but going to the temple and that's all. That's all his interest is, is in his religion and nothing else.

Q. Does he talk it? A. He talks it all the time, yes; that's all he usually talk about.

Q. Do you know when it was that he first became acquainted with the Nation of Islam? A. Well, I think it was in—I'm sure it—well, I'm not sure, but I think it was in about 1960, or 1961.

Q. Well, did you every try to, more than once, try to stop him from— A. (Interrupting) Yes, I tried a lot of times.

Q. And tell Judge Grauman what you noticed when you attempted to dissuade him or stop him; what effect did it have? A. Well, what effect?

Q. What effect did it have on him; did he [316] agree with you, or— A. Oh, no; he didn't agree with me. He told me he was not going to change. No, it didn't have any effect at all. He was going to stay that way.

Q. Did he make any statement about what he would do if it became a matter of life and death? A. Well, he always said he would die for his religion. He said that, oh, so many times. He said that even before he was inducted into the Army. He said it ever since he's been in the—he said, "I will die for my religion."

Q. You are familiar, of course, are you not, Mrs. Clay, that the Registrant has conscientious objections and con-

scientious scruples against performance of military service, do you not? A. I didn't understand.

Q. You know that he objects to going to war, don't you? A. Yes, sir.

Q. Could you tell Judge Grauman what your opinion is as to whether his opinions and beliefs are honest or dishonest, or what? A. Well, I know his beliefs are honest. I know he's sincere about it because he always said that he [317] couldn't—he just couldn't go to war because it's against their religion and he just couldn't do it; his religion, you know, didn't permit it.

Q. I ask you; you know that he is not a coward, don't you? A. I know he's not a coward. I know it's on account of his religion is why he cannot go.

Mr. Covington: That's all I have.

Judge Grauman: That's all, Mrs. Clay; thank you very much.

Mr. Covington: Your Honor, if I could have just about two or three minutes recess?

Judge Grauman: Yes, let's take a few minutes here.

(Whereupon a short recess was had after which the following proceedings occurred:)

Judge Grauman: Ready, Mr. Covington?

Mr. Covington: Yes, Your Honor; we will have Mr. Clay now.

[318] Mr. Cassius M. Clay, Sr., called as a witness, by the Registrant, was examined and testified as follows, to-wit:

By Mr. Covington:

Q. Would you please state your name, your age, and your address? A. Cassius M. Clay, Sr., 7307 Verona Way.

Q. Will you talk a little louder? A. Cassius M. Clay, Sr., 7307 Verona Way; fifty two years old.

Judge Grauman: Fifty-two?

The Witness: Fifty-three.

Q. And what is your occupation? A. Commercial artist.

Q. I'm sorry; I didn't hear you? A. Commercial artist.

Q. You are a commercial artist? A. That's right.

Q. You are the father of Muhammad Ali, formerly known as Cassius Clay; is that correct? A. Yes, sir.

Q. Now, could you tell Judge Grauman the religious faith in which he was raised? A. Muslim.

[319] Q. Yes; well, his? A. Islam.

Q. What was he raised under, what faith? A. Oh, what was he raised under; a Baptist.

Q. A Baptist; and what is your religion? A. Methodist.

Q. But the wife's religion is Baptist and you allowed her to raise him up as a Baptist, did you not? A. Yes, sir.

Q. And up until what period of time did he continue as a Baptist? A. I can't tell exactly when he broke off.

Q. Now, precisely, just—well, about when was it? A. Oh, I guess—say about—probably say about eighteen years old.

Q. When he was eighteen years of age? A. I say, about.

Q. When was it that you and Mrs. Clay became aware

of the fact that he had interested himself in the religion of the Black Muslims, as it is called by the newspapers and known as the Nation of Islam, officially? A. I couldn't —can't give you exactly the time, but mostly in Florida.

[320] Q. Would you talk up, again, a little louder so Judge Grauman can hear you? A. Oh, well, I can't remember exactly the time and date, but I'd say around a little bit forward to Florida and about along that time.

Q. Now, did you and Mrs. Clay ever have any discussions with the Registrant about not embracing the faith of the Nation of Islam? A. No, we didn't care too much about it, but we didn't understand it, you know, and we tried to get him out of it, you know. We wanted him to stay a Baptist of course, but that gets out; they change, you know, and naturally, everybody has a right to change, whatever they want to be.

Q. Well, whenever you tried to dissuade him or get him to quit what he was doing with the Nation of Islam, or to give it up, what happened? A. Well, he would tell us, "I'm serious. You think I'm—I'm serious; this is my religion and I believe in it. I like what they teach," you know, about not eating pork and that stuff, you know.

Q. Did you ever reach the point to where you felt that it was a useless thing to try to change his mind any more? [321] A. I believe so.

Q. Are you familiar with his belief? A. No, sir.

Q. In opposition to war? A. Am I?

Q. Has he ever made any statement to you about his opposition to military service? A. Well, I think he said he was a conscientious objector.

Q. Right. A. And his religion—he'll die for that, you know, die for his religion, his faith, you know, the teachings of the Islam faith—not fighting.

Q. Now, when he has come home what has been his primary activity, in discussions; what does he talk about since he's embraced the Muslim— A. (Interrupting) The Islam faith and their religion; that he'll die for it. He says, "I'm serious; I'll die for this," and says, "I'll lay down my life for this.

Q. When social groups get around the house what does he talk about, business, or fighting, or the Islam faith? A. Islam faith.

[322] Q. Do you believe that he is honest and in good faith about his belief? A. In fact, I know he is.

Q. You know he is? A. Yes.

Mr. Covington: I believe that's all.

Judge Grauman: You said he said he would die for the Islam faith?

The Witness: Yes, sir.

Judge Grauman: Well, how did that subject come up?

The Witness: Well, we keep trying to hammer him out of it, you know, and he just says, "You all think I'm kidding." He says, "I'll die for this thing."

Judge Grauman: Now, Mr. Clay, I believe you gave a statement to the Government agents and they came to see you?

The Witness: Yes, sir.

Judge Grauman: Did you tell them that you thought your son would never commit any act of violence?

The Witness: Yes, sir; said he'd [323] never commit it; no, sir; that's right.

Judge Grauman: All right, sir; that is all.

Mr. Covington: That is all. I will call the next and last witness, Muhammad Ali, known also as Cassius M. Clay, Jr., the Registrant.

[324] CASSIUS M. CLAY, Jr., called as a witness, on behalf of the Registrant, was examined and testified as follows, to-wit:

By Mr. Covington:

Q. Would you please state your name and your age and your residence? A. Well, my name is Muhammad Ali, and my slave name was Cassius Marcellus Clay, Jr., and my home address is now at 4610 Northwest 15th Court, in Miami, Florida.

Q. And where do you spend most of your time? A. I spend most of my time at my business office and with my leader, Honorable Elijah Muhammad, at his house in Chicago, Illinois.

Q. Now, tell Judge Grauman—we have heard about your being raised up as a Baptist—how it was that you got acquainted with the faith of the Nation of Islam? A. Well, it's true I was raised as a Baptist and during the time that I was a Baptist I never understood the teachings of the christian—

Q. (Interrupting) I wonder if you would be good enough to talk a little louder? [325] A. It's true that I was raised as a Baptist and while being raised as a Baptist I never understood the teachings of the christian preacher, and I never understood why that Heaven was in the sky and I never understood why Hell was under the ground and I never understood why the so-called negroes had to turn their cheeks and have to take all the punishment while everyone else defends themselves and fought back.

I never understood why our people were the first fired and the last hired.

I never understood why when I went to the Olympics in Rome, Italy, and won the Gold Medal for great America

and come back to Kentucky and I couldn't go in a downtown restaurant, and I always wondered why everything in it was white.

I always wondered these things and I am saying this to tell you why I accepted the religion of Islam the minute I heard it then while in 1961 I was walking down the streets of Miami, Florida, a Muslim walks up to me and asked me would I like to come to Muhammad's Mosque and listen to the teachings of Islam and listen to why we are the lost people and listen to why—what my true religion was before we were made slaves and this sounded interesting and, by me being a person of common sense, I went to the [326] Mosque to listen and immediately, on entering the Mosque—I would say the first half hour after being there, I immediately wanted to know what could I do to become a member, and I started to say that the minister of the Mosque was preaching on the subject of why are we called Negroes. He said that the Chinese are named after China and Cubans are named after Cuba and Russians are named after Russia and Hiwiians are named after Hiwaii and Mexicans are named after Mexico and Indians are named after India.

So, he said, what country is named Negroes and he said why are we called negroes, and this made sense to me and I had to check into it.

I asked questions and he gave me good answers and he also said that we do not have our own names and all intelligent people on earth are named after their people of their land and their ancestors. He said the Chinese have names such as Chang-Chong, and Cubans have names such as Mr. Castro, and Russians have names such as Mr. Kruschev and Africans have names such as Lmumba. We call ourselves Culpepper, Mr. Tree, Mr. Bird, Mr. Clay,

Mr. Washington, and he said these were names of our slave masters, and by me being an intelligent man and the Lord blessing me with five senses, I have to accept it because there have been write-ups in the Louisville papers where [327] my father and me were named after a great white slave father named Cassius Marcellus Clay.

So, I had to accept this, and he also told us that the proper name of God is Allah and that the Honorable Elijah Muhammad was taught by Allah for three and one half years to teach the so-called negroes the true knowledge of his God, the true knowledge of his religion, true knowledge of his names and his future and not to force himself on whites and not to beg whites to come to clean up the rats, but to clean up our own neighborhoods, respect our women, do something for ourselves, quit smoking, quit drinking and obey the laws of the land and respect those in authority.

Immediately, I had to check and see who is Elijah Muhammad because Elijah Muhammad teached and I asked all the press who he is and they said that he was a self-styled leader and I had to find out what self-styled meant and I found out that everything that he teached then he had to style it his self.

So, common sense just told me that a man can't stand here in the middle of America preaching the things that he's preaching and no government, no lawyers, no doctors, no theologists, nobody would challenge him or as much as even mention his name in public.

So, after finding out who he was, and I had to [328] convince myself that he was a divine man from God because I knew that I would have to give up a lot and now that I have accepted the religion of Islam, I turned down at least one million, eight hundred thousand in movies.

I have turned down a two million bout in Chicago with Ernie Terrell, and I have—I just put up fifty thousand cash yesterday to alimony fees on my wife only because she would not wear the proper dresses and be a Muslim.

All of this is why I am a Muslim and I really sincerely believe it and as my father and mother have said, I'll die right now in this courtroom, because I know this is the truth I'm talking.

Q. Now, you first got acquainted with the Muslims, the Muslim belief in Miami? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. Now, who took you under wing, or who influenced or guided or directed you while you were in your initial stages of training in the Muslim faith? A. Well, I would say the true person that really guided me and directed me while I was at the Mosque that was the minister at that time, his name was Ishmael X., [329] and Sam Saxon here, my driver and helper, he was with me a lot when he would —I'd go to the restaurants and I would order bacon and ham and he would tell me about how the hog is an unclean animal and how the Lord created the hog as a scavenger and that we shouldn't eat it and that it affects our arteries, sometimes high blood pressure, some times low and he convinced me to quit eating hog and he always stuck with me and chased me out of the night clubs and I would be in there with women and drinks and all and he would get me out of night clubs and take me to the temple when I didn't want to go and he was one of the persons mainly instrumental in keeping a check on me as far as my young membership was concerned.

Q. After what period of time were you able to be on your own? A. Well, I was able to—I remember talking about it with the Honorable Elijah Muhammad and he said

that we are all human and none of us are able really to be on our own.

Q. I understand, but where you didn't need the guidance or the constant surveillance or watching by Mr. Saxon? A. That was about three weeks before the Sonny Liston fight when I became officially registered and [330] put my name on the Lamb's Book of Life.

Q. Now, would you explain to Judge Grauman how it is and why it is that you have accepted the name Muhammad Ali? A. Well, after, as I said, after hearing the teachings of the Honorable Elijah Muhammad and hearing the history of the so-called negro and how we were given slave names and the fact that we do have names of our masters, and the Honorable Elijah Muhammad tells us that we were declared free a hundred years ago by Abraham Lincoln and we were not free in name as well as fact, so therefore, we who come into the knowledge of ourselves and understand who the Honorable Elijah Muhammad is, it's an honor and a pleasure to receive an "X", which means that such as an ex-convict, or Joe Louis was an ex-champion, and it means we were ex-christians, the "X" meaning we are no longer a product of the old christian ways that we were.

So, therefore, we take the name of "X" and it's a great honor and pleasure and blessing to receive a holy name whether it's Robert or Corene or whether it's Robert Shabazz, or any last name, but I was blessed to have two holy names and I had to accept them and the Honorable Elijah Muhammad named me on radio about one month after my fight with Sonny Liston, and at the time I did not know [331] that he would name me. I just heard on the air that would I accept the name and immediately, I did, and I would like to explain that the names of Muhammad Ali

are two attributes of Allah. Muhammad means one who is worthy of all praises and one most praiseworthy, such as the supreme being, and Ali, means most high and ever since I have accepted the name of Muhammad Ali I now have government invitations pending from countries like Saudi Arabia, Egypt, Sudan, Pakistan, Syria, Turkey and Lebanon now pending because of my Islamic convictions and my accepting the Muslim faith and the name of Muhammad Ali, and not only am I proud that I accepted it, but I'm now benefiting the honors, all of the honors and praises from accepting it.

Q. Now, what, if anything, did you do about your belief that—did you just quietly sit and say nothing to anybody about it, or did you get up and do something about it and go tell others and try to get them in the organization?
A. Well, Almighty Allah is my witness now, as I sit on this stand, about one hour after I first heard the teachings of the Honorable Elijah Muhammad, immediately I would run up and down the streets shouting it to other negroes thinking that they would all accept it and love it whenever they heard it, but I found out later [332] that many of them are dead to the knowledge of the truth and they are hard to talk to and the Captain would have to stop me a lot and tell me to quit preaching and hollering on the streets too loud because all of these people heard of it before me.

They have had a chance to accept it, but they wouldn't, but now I'm a little more mellow in my approach on people, but constantly—but answering your question, I would say at least—at least six hours of the day I'm somewhere walking and talking, or going to schools or colleges all over the country, Muslim temples, and there are some fifty odd mosques all over the United States that I am invited

to minister at right now, and constantly—in Chicago, I have this thirty passenger bus that, daily, we go out bringing in busloads of people to the mosque, and now I'm talking to the Blackstone Rangers, which is the worst negro group in the wilderness of North America who have killed at least one hundred boys since they've been in Chicago, and the police—nobody could handle them and I was blessed with, all praise due to Allah, I was lucky enough to round up the twenty-one of the ring leaders and take them to Jet and Ebony magazine and where the write up will come out in Ebony and Jet magazines sometime this week on the confessions they have made, how they say they are ashamed for the way they been shooting and [333] killing and how I've convinced them to come together, and this will be out soon. So, this is what I do as far as ministering and talking is concerned.

Q. All right. A. It's daily, all the time, but not only to blacks, but to many whites, on television, just as the Les Crane Show, Johnny Carson and the Irv Cupsonet Show in Chicago and Jack Brinkhouse on his Radio show where people call in—constantly defending the faith and teaching it, and we have to do more talking because daily, these American, so-called negro leaders are coming to our headquarters and they are coming to me and they are asking us more about our side of the program, so really, I'm planning to go full time after this fighting is over, which I hope is in another year.

Q. But as a matter of fact, you put in about a hundred and sixty hours a month in it now; isn't that right? A. Something like that; maybe a little more; yes, sir, but when I'm really in training and in camp for fights, a week or two before the fight I don't have time, not too much time, because I really burn a lot of energy debating and

answering questions, so during training we don't do too much ministering.

Q. Right; now, tell the Judge what you have [334] done in your fishing work as compared to what other Muslims—and we are not saying this to brag or anything, but just to state the facts—as to numbers that you have been able to bring in at the various places? A. Yes, sir; I understand. First of all, I'd like to say that many people say that the reason I am so successful in my accomplishments as far as fishing great numbers of people is because I'm the heavyweight champion of the world and if I wasn't the heavyweight champion of the world I couldn't draw the people, but the reason I can so strongly walk by all of this is because I, myself, know that it was the teachings of Islam that taught me to really restrain from cigarettes, women of all races that at least many negroes run to in opposition to the teachings of Islam, and this is the onliest thing now keeping me out of night clubs and places that serve alcoholics like liquor and demonstrations where I could become popular in leading people.

So therefore, it's the teachings of Islam that has given me the proudness and boldness to say, "I'm the Greatest," and lift my chin and which has enabled me to be one of the most popular athletes on earth. So, therefore, when they tell me that if it were not—"If you were not a Muslim; if you were not heavyweight champion; [335] you would not have—you would not draw these people. So, I know that it was Almighty God, Allah, through the teachings of the Honorable Muhammad Ali, that enabled me to be strong, plus to keep going once I—my mother and father raised me from a little boy to the age of eighteen to be strong and healthy, but after receiving fame and leaving the city, the teachings of my mother and father,

the teachings of the christian church, that couldn't put enough fear into me to stay out of night clubs and couldn't put enough fear into me to dodge the English ladies and American white ladies and Negro ladies that chased me daily.

So, therefore, when they say that, "You would not bring in five hundred people," inasmuch as I do sometimes, "You would not bring these five hundred people if you were not the champ," well, if it was not for Allah and the teachings of the Islam, I would not be champ and I could not hold my title so strongly after being the champion, so I would say that the average Muslim, answering your question, that the average Muslim is doing good if he brings three people on the average a night to the mosque and my average, all praise to Allah, with my title, I've been able to bring in, at the most, in three days' time my [336] record, in Detroit, Michigan, and that was about five hundred and fifty people and on the average it's about thirty people a night.

Q. Now, have you devoted time not only to fishing, but also to teaching and preaching in the mosques and temples and various—in the various parts of the United States in the Nation of Islam? A. Yes, sir; and I'm due to be in Atlanta, Georgia Mosque next Friday, but it will not be possible because I have to go to Germany for this bout, but much of my time is spent in the mosques in whatever city—there's not a city in the United States where there's a mosque that I don't visit when I'm in the city, Muhammad's Mosque, and I have invitations to come to various Muslim groups and I will be speaking and lecturing to about ten thousand people the 28th of this month in Chicago at the international amphitheater where the Honorable Elijah Muhammad is addressing all of the press and

the negro leaders and Muslims plus all of the negroes that are not Muslims, so we expect a crowd of about maybe ten thousand where I will be, I hope and pray Allah, one of the major speakers.

Q. All right. Now, I want to ask you whether or not it is true as stated in your conscientious [337] objector form, and in other papers that are on file, that you have honest, sincere convictions and conscientious objections to the performance of military service, combatant and non-combatant; is it true that you do have these objections sincerely? A. Well, sir; I would not—and I say this before the Judge and the many here and Almighty Allah himself, who I'm sure is looking, wherever we talk, but I would not just say this just to get out of the Army—I have, I would say, and excuse the expression, caught more hell for being a Muslim, even before the Army talk came up, with my wife and boxing, and the movie rights that I turned down, the advertisements, the T.V. commercials, the royalties and endorsements that I have had to turn down and I have done all this before the Army came up and it's not just saying that I would not participate in war, but we actually believe it and feel it.

We fear—we fear the wrath of Allah once we come into a knowledge of Almighty God, and once we understand who the Honorable Elijah Muhammad is and his mission, then we fear—we fear Allah; we fear what will happen to us if we go astray of his teachings in any way.

So, therefore, we are awful serious in anything we say about fighting a war, adultery, or fornication, or [338] drinking alcohol, cursing, using profanity, or anything that is against the teachings of the Holy Qur'an and the Honorable Elijah Muhammad, and Allah is who we really fear.

Q. Now, you heard the testimony of Mr. Saxon, did you not? A. Yes, sir.

Q. To Judge Grauman; and do you agree with him as to what he said concerning the teachings of the Islam Nation? Do you agree with what he said about what the faith teaches? A. Yes, sir.

Q. Now, would you go into military service? A. No, sir.

Q. And would you tell Judge Grauman why not? A. Military—you mean as far as weapons are concerned?

Q. Yes; well, military service of any fashion. A. Well, sir, Judge; we are taught, and we who believe in the teachings of the Honorable Muhammad Elijah, which is bestowed upon him from Almighty God Allah, and the Holy Qur'an, we believe sincerely in the teachings and this was written before my mother and father birthed [339] me into the world—this was in the Holy Qur'an before I was birthed into the world and not just something I'm talking up to dodge military service, but the Holy Qur'an do teach us that we do not take part of—in any part of war unless declared by Allah himself, or unless it's an Islamic World War, or a Holy War, and it goes as far—the Holy Qur'an is talking still, and saying we are not to even as much as aid the infidels or the non-believers in Islam, even to as much as handing them a cup of water during battle.

So, this is the teachings of the Holy Qur'an before I was born, and the Qur'an, we follow not only that part of it, but every part.

Q. Now, on page eighteen of this F.B.I. report that you have read over, it says that the registrant stated that he would not have a—would not have to go into military service because of his religion, but added that if he had to

go he would go. Now, does that mean there that you would go into the military service? I show you this, and did you say that? A. No, sir, not—I can't remember saying that. I couldn't—I mean, the way I feel now is the way I felt then and I don't see why I would change or say something like that, that would be contrary to everything [340] that I believe and stand for.

Q. The "if he had to go he would go", is that your belief? Is that your statement? A. No, sir; that's not my quote, sir. I know nothing of who wrote that, or when, what paper it was in.

Q. Did you ever tell anybody that you would go into the military service since you have embraced the faith of the Nation of Islam? A. No, sir.

Q. Would you explain to Judge Grauman about what it say here on page twenty-one of the F.B.I. report about the time when you purchased a gun—that gun in Miami—and it says that he recalled that when he saw a press report that the registrant had purchased a gun, he went to the registrant, that is talking about Mr. Saxon, now, and the Registrant, that's you, explained that he had purchased it more or less as a toy, and Mr. Saxon stated that he immediately took the gun from the Registrant and threw it in the Atlantic Avenue. Would you explain to Judge Grauman how come you to get the gun, why, and then what happened, in your own words here, as it happened? A. I was walking down the street, about Ninth Street—exactly Ninth Street, and Northwest Second [341] Avenue, in Miami, Florida, on the right hand side of the street, and there was a—a pawn shop, and at the time I was looking for a used record player.

We train in Miami, and I don't stay in Miami, so I didn't want to buy nothing too expensive—something worth about

twenty-five or thirty dollars. So, I purchased this old record player worth about thirty-five dollars and on the way out, he had a bunch of old guns, Colt 45's and derringers, the one that Matt Dillon used, and all kinds of guns, and it was interesting, and this particular gun, I think he said went back as far as ninety-six years and it was a little, real, steel gun and it broke down; carries a little bitty shell —I think it's a twenty-two, or smaller, and I think I bought that gun for about thirty, thirty-five, or forty dollars and it was an old gun, kind of rusty. It was really just an old, brownish-steel looking, and I just bought the gun and it was about that long and it was about that wide (indicating).

Q. You are indicating about three inches by two inches, is that—or four inches by three? A. About like that, yes; and I just took it home with me, and the next day it came out in the papers that a gun was bought and registered by me, and at the time I think some kind of trouble was going on. I think it was [342] either with Malcolm X, or someone, some kind of radical talk was going on and the word got out that I was afraid and I had went and bought a gun to defend myself, and it was a joke because the gun barely will shoot. It was old and rusty and it broke down. If I bought a gun to defend myself I would buy a new six shooter, or something that would shoot seven, eight times, if I was that kind of person, but this is just a one-shot derringer and I bought it to just hang up over my little mantel place—just a mantel piece, and Sam came in and he took it down and said, "We can't have these", and I said, "They make a lot of these things, but they don't really shoot," and he said, "We don't even want it around," and he said, "If the Honorable Elijah Muhammad walked in here he'd put you out for having it," so we had to—I gave

it to him. He's the Captain of our Mosque, ordained and authorized and commissioned by the Honorable Elijah Muhammad in all of the temples throughout the Miami area. So, he contended that it was an order and I had to give it up and so then he threw it away.

Q. And did you give it up conscientiously— A. (Interrupting) Oh, yes.

Q. (Continuing) and willingly and without any complaint; is that right? [343] A. Yes, sir; yes, sir.

Mr. Covington: Now, Your Honor, I'd like to stand here next to the Registrant.

Judge Grauman: All right.

Mr. Covington: Because we both can use this together.

Judge Grauman: All right, sir.

Q. Now, on page twenty-five of this resume of the F.B.I. which you have read, it states, and may it please the Court, I am not going to make a legal issue here that I want you —that I want Your Honor to rule on; I just want to note it for the record, that it is my opinion, in behalf of the Registrant, as his counsel, I would object to all of the material that appears on page twenty-five and twenty-six and twenty-seven where there are quotations from newspapers, because this does not properly constitute a resume or inquiry, but since it is in here and we have read it, we are going to go ahead and make our comments on it, but I just want to let the Record show that it is my belief that these newspaper items compound hearsay upon hearsay, which is illegal, but I am not asking for a ruling from Your Honor. I just want to reserve it for whatever the Record may be worth and let the Department of Justice rule on it.

[344] In other words, I want to let the Record know that we're protesting and that we are not going to let it go unanswered because we do protest. Newspaper articles are not people and a résume of inquiry is properly based upon inquiry of people, not quotations from newspapers.

Now, coming down to the specifics where it that the following materials are based upon press accounts, the Amsterdam News, New York, on March 28, 1964, quoted the Registrant that:

> "I was rejected by the United States Army but I was ready to go. I was ready to do what the Army requested."

Now, you heard what you—what I have just read to you, have you not, Muhammad Ali? A. Yes, sir.

Q. And you see that underscored? A. Yes, sir.

Q. When I showed—I mean, when I read you that and when you and I talked about that what was your statement and what is your statement now to Judge Grauman about that statement? A. Well, this—I would say this, now, that this Amsterdam News is a negro paper and they are known for slandering and I believe, making many mistakes. [345] They have on me. They even as much as, one time, took me standing beside a model and cut my arm off and drew another arm and drawed her hand wrapped around my hand, saying that she was my next wife, and this is a fact, and we started to sue the newspaper for it, but the Editor of the paper knew our leader, Honorable Elijah Muhammad, and I was advised not to, but they actually drawed a picture of my arm—cut my arm off from here (indicating), down and made me holding her hand. So, this is the kind of newspaper that is.

I don't remember who this was. I don't remember who even wrote this and I can't see myself saying nothing like that.

Q. Are you sure that you didn't say it? I mean, were you ready to go into the Army when you made that statement? A. No, sir; no, sir.

Q. That statement of "I was ready to do what the Army requested." ? A. No, sir.

Q. And if you did, it would be inconsistent with what you have told the Judge here what your beliefs are— A. (Interrupting) Yes, sir.

[346] Q. (Continuing)—would it not? A. Yes, sir; and I wouldn't say nothing like that, just fearing what my leader would say if he had read it; no, sir.

Q. Now, the next is from the Chicago American on February 24, 1966, reported that:

> "the decision that the Registrant would become a conscientious objector was made by the Black Muslims."

That was your decision, wasn't it? A. Yes, sir; nobody makes decisions for me. The Black Muslims wouldn't make no decision for me. This is all mine and everything I lose, or turn down, if I may say give up, is my decision. Nobody makes decisions for me; no, sir.

Q. Now, here, the Los Angeles Sentinel, and I'm reading from page twenty-five, on August 13, 1964, quoted the Registrant's wife as stating that:

> "She was a Muslim and that her leader is the Honorable Elijah Muhammad."

As a matter of fact, she never was a Muslim; now, isn't that the— A. (Interrupting) No, she never was a Muslim,

same way she lied she told me she would embrace [347] the religion of Islam, and she told me that she would do anything that I say—marrying a man like me, a man of my stature and physical ability, wealth and fame, she'd be fool not to obey and do what I asked her to do, but she lied then, which it was proved in the Miami court she was lying and now she's lying in this newspaper write-up if she said this, that she was a muslim and her leader was the Honorable Elijah Muhammad. She had never been a Muslim and never said her leader was Honorable Elijah Muhammad.

Q. Now, this says that the Miami Herald of June 8th quoted the Registrant's wife—that's you, the Registrant—quoted the Registrant's wife as stating that the registrant slapped her. A. No, sir; I never touched her one day of my life and I don't see why she'd tell a lie like that and I don't remember her telling it to the newspapers.

Q. Now, the Courier Journal here in Louisville, on March 24th, reported that you expected to be called up for the Army duty and your inclination now is to serve, and that's March 24, 1963, to serve two years and get it over with rather than serve six months and attend the reserves. Did you ever make such a statement as that, that you— A. (Interrupting) I'm not saying—I won't [348] lie here on this stand in front of the Judge that I didn't say that. It's possible that at the time, campaigning for the championship, before I was recognized as a Muslim by the Honorable Elijah Muhammad himself, and I'm sure that was before I registered and put my name on the Lamb's Book of Life, and a real, registered follower on paper, but this is possible. I can't remember now.

Q. That could be before that? A. Before, that I said something like that, yes.

Q. Now, the next one here, the Chicago Sun Times, for July 3, 1963, quoted you as saying that the Black Muslim organization is the greatest one that you found, but that you added that you did not know whether you were a member of the organization. This was July 3rd of 1963. A. Yes, that's—I don't know if those are my exact words, but the whole basic idea and philosophy of this paragraph is right.

Q. At that time? A. That—at that time, yes. I knew that I believed, but at that time I didn't know that to be a registered Muslim you would have to sign, answer questions and pass a few tests.

[349] Q. But you did in 1964; is that right? A. '64, yes, sir.

Q. It states in here in the Herald Tribune in New York, January 23, 1964, it is reported that you registered at eighteen and while visiting in New York at that age, you first heard a speech by a Black Muslim, and his interest in the organization was revived—that means your interest was revived—when you started attending Muslim meetings in Miami.

Did you first become acquainted in Miami, or in New York? A. I don't—I didn't become acquainted with the teachings of the Honorable Muhammad Elijah in New York at that time, but I did, in Harlem, they hold street rallys, black nationalities and all kinds of civil rights movements and they all talk on the same basis and the same philosophy, in a way, of the teachings of Islam is taught by the Honorable Elijah Muhammad, but I was enthused over the talk that he was talking about how we need freedom and how much hell we have caught and how we are living in rat houses and we're the first fired and the last hired and this and that, and that, and I was enthused by that idea,

but the basic teachings and foundation and getting to the root of the problem of the so-called negro and [350] and knowledge of ourselves and religion was gotten in Miami at Muhammad's Mosque.

Q. Now, the Miami Herald for February 7, 1964, reported that:

> "The Registrant's father stated that the Registrant had joined the Black Muslims four years ago at the age of eighteen."

A. No, I don't—that's not right.

Q. That is not a correct quotation? A. I don't think they quoted him right because I wasn't—at the age of eighteen I was still in Louisville and never had been to Miami, Florida, until later, about 19—

Q. (Interrupting) Your father has testified here today. You heard his testimony? A. Yes, sir.

Q. Now, the New York Journal of February 27, 1964, quoted the Registrant in connection with some recent Muslim meetings and here is what they said you said:

> "I have just spent four hours with God. He is going to fix it up so I won't have to serve in the Army."

A. No, sir; that's got to be a misquote. I've never seen God. I never—I—that's foolish, saying [351] I spent four hours with God. That was a real misquote.

Q. Now then, the Chicago American for February 28, 1964, reported that the registrant revealed that he had been a Black Muslim since 1959 when he was seventeen years of age. A. No, sir; that's—whoever got that, it's a misquote. I never remember saying that, and in 1959 I was in the Golden Gloves in Chicago and I was living

here in Louisville and had never really been out at the time. So, they—I don't see where they got that.

Q. March 8, 1964, issue of the Courier Journal, Louisville, Kentucky, reported you as stating you didn't—you don't hate anybody and, "I know the Muslims don't teach hate. If they did I won't be with them." That is correct, isn't it? A. That's true; we do not. Many people confuse the teachings of the Honorable Elijah Muhammad with the teachings of hate and the onliest hate I know, as far as the teachings of the Honorable Elijah Muhammad is concerned, and that is we hate the way that we've been treated for four hundred years. We hate the way that our pregnant women are being kicked around the streets; we hate the way the innocent negroes have been shot and lynched and killed outright, but the killers are not—never been caught, [352] we hate that we're the first fired and the last hired and we hate the way we have served so faithfully for the country in all wars and have spent three hundred and ten long years and enabling America to have fifty of the richest states on the planet and yet still we are subjected to treatment which cannibals and Africans are treated better.

So, this is what we hate and then, we, as far as hating the white people as a race is concerned, we have so-called negroes that are white, we have chinese that are white, we have Muslims in Saudi Arabia that are white or that are European, we have Muslims in Pakistan and we have Muslims all over the world that are white. So, we do not hate white people. We hate the way certain people have treated us and we also, now, have a better knowledge of ourselves. We have a better knowledge of nature. We have a better knowledge of where we should go, where we shouldn't go, what we should do, what we shouldn't do.

So, we are taught by the Honorable Elijah Muhammad that if a wild lion broke in, say this courtroom now, I would break out—not because I hate lions. I don't have a chance to hate the lion. I just know his nature is not like mine and we can't get along. So, we don't hate white people, and we not only—we get a knowledge of ourselves and we want to be clean physically, morally, mentally, [353] and we want to do something for ourselves and we no longer are what—we no longer want to force ourselves on the master and we no longer want to beg the master. We want to separate since we are free people; since integration will not work, and we are the ones who are trying to force it and receiving in return some of the most brutal treatment of any humans on earth.

So, we do not hate white people. We want to go for ourselves and do for ourselves and get some of this earth that we can call our own like other intelligent civilized humans do on the planet Earth. So, this is the press, distorting the teachings of the Honorable Elijah Muhammad; this is the press trying to turn negroes against these teaching and brain washing the world to the truth of the Honorable Elijah Muhammad. We are not haters. He teaches us to love. We don't break no laws. We are not in no riots, no demonstrations. We pray five times a day. We fast three days a week and we constantly worship at the Mosque three nights a week. We are peaceful people and we are not haters, but we are the victims of hate.

Q. Now, the New York Times on March 24th, reported that you were first introduced to Islam when you were seventeen years of age in Atlanta. A. No, sir; that's—when I was seventeen [354] I had never been in Atlanta. This is all false quotes and I don't see where they got them from, for that's the F.B.I. too.

Q. Now, this statement down here at the bottom of page twenty-six:

> "If all American Negroes are not Muslims within two years I will get out of the Muslims—"

is that— A. (Interrupting) Where was that? When was that supposed to have been said?

Q. This is a quotation that was supposed to have been said on May 22nd of 1965, or about that time, quoted in the Chicago Daily News. A. No, sir; that's a misquote, and I have heard the Honorable Elijah Muhammad said that Allah has revealed to him that at the end of 1966 as far as the Muslim calendar is concerned, or Islamic calendar, which is, I think, four months longer than the one we have here in America, every so-called negro will be sympathizers or believers in the teachings of the Honorable Elijah Muhammad, but I never made a statement that I would leave this if every negro is not a Muslim because it is predicted in the Bible, in the Holy Qur'an, that many will not accept and [355] many will go down and so therefore, that's an illiterate statement for me to make and I wouldn't say nothing like that and it's a misprint.

Q. Now, here on page twenty-seven, it is quoted in the Chicago Daily News, February 18, 1966, about your stating your conscientious objections, having no quarrel with the Viet Cong and I want to come down further where it says that the Registrant—that means you—Muhammad Ali, was further quoted as saying:

> "Let me tell you what Muslims are taught; to defend ourselves when we are attacked."

That's correct, isn't it? A. Yes, sir.

> "Those Viet Cong are not attacking me. These Viet Cong are righting a very nasty war over there. There's a lot of people getting killed. Why should we Muslims get involved. Besides, I'm fighting for the Government every day. I'm laying my life on the line for the Government. Nine out of ten soldiers would not want to be in my place in the ring. It's too dangerous."

Now then, that was in—was that statement made? [356] A. Yes, I would like—

Q. (Interrupting) Explain it then. A. I would like to say—

Q. (Interrupting) Tell how it came about and give the whole picture. A. I would like to say that everything in that—I believe that is true and I'm also taught by the Honorable Elijah Muhammad and ministers of the Islamic faith or teachings that there is an old saying, "He who keeps his mouth shut will save his life," or something. I'd have to check the Holy Qur'an and Bible to see what it was I referred to, but it says, "He who keeps—holds his tongue will save his life," and this is the truth and we actually believe it and it's proof and it's factual, but this was me, talking on my own, not as a minister of the Honorable Elijah Muhammad, and I was condemned by him officially in the religion for making such a wild, boastful statement, but I was excited at the time and disturbed and speaking—and I have paid greatly for it.

Q. All right. Now, you heard the testimony of Mr. Saxon about the Eternal Message of Muhammad and that book, concerning the four hundred years ago statement? A. Yes, sir.

Q. And your testimony would be the same as [357] his about that, wouldn't it? A. Yes, sir.

Q. Now, here at the top of page twenty-eight it quotes the Chicago American of April 8, 1966, as saying that you tried to join the Army Reserves in Nebraska, but you had been turned down. A. Sir, that's another misquote, and did you say that was the F.B.I.?

Q. Well, this is a resume of what the F.B.I investigation turned up and they put this quotation in there from this newspaper. A. I just didn't know they could be so wrong because I have never been in Nebraska where—I've never been nowhere around Nebraska trying to join no reserves or whatever it is.

Q. All right; so this is incorrect? A. All incorrect, sir, right.

Q. Now, on page twenty-eight it refers to a statement that you wrote an article in April—April 15, 1966 issue of "Muhammad Speaks" about being successfully carried through major fights and you referred to the Chuvallo fight as on that you put faith in yourself father than God. Is that right? A. Yes; I constantly—

[358] Q. (Interrupting) Would you explain to the Judge about how that came about that you wrote that and why? A. Well, the reason—what happened was that during my fight with George Chuvallo in Toronto, Canada, the fight was changed and I was scheduled to fight Ernie Terrell and the last ten days there, the fight was changed to George Chuvallo and I had to completely change my style. I was training for a tall, fast, clever boxer, and I had to change to a short, brawling, mauling type of fighter, such as Rocky Marciano, and it was such a quick change until I told the press that I—I was about ten pounds overweight, and the press asked me how would I fight—

how would I get in shape and at that time the press releases went something like this—I told them that I—this is a quick change and I'm going to have to rely on my speed of foot and my speed of hand. I'm going to have to rely on my natural ability to pull me through this one. Then, the fight was tough. It did go close. I hurt my hands in both fights—I mean, I hurt both hands in the fight and I had a terrible headache and after the fight, usually when I pray, I praise Almighty God, Allah for the Honorable Elijah Muhammad and his teachings of righteousness and cleanliness that enables me to come through [359] so victorious and superior over all my contenders without a mark on my face.

I didn't do it after that fight and after the fight I said it was my natural ability that pulled me through and I didn't mention Allah or his messenger, and later, I realized what had happened, one night, how I had forsaken Allah; how I had forgotten to praise Allah after the fight, and before the fight I was praising more so my natural ability than I was Allah, and so therefore, I had to get it off my chest, off my conscience in the Muhammad Speaks newspaper and I wrote an article, bear witness that there is no God but Allah and Muhammad Elijah is his Messenger, and the worst fight I had, the closest fight that I had, I didn't praise Allah; I didn't praise his Messenger, and the results were seen by hundreds of thousands on the closed circuit television and were disappointed in the outcome of the fight, and I had to be a man and admit that it was my fault in the whole. The whole thing was my fault and the way I conducted myself before the fight and after. So, that's the results of—I mean, that's what you're reading.

Q. That's right; that is what it refers to. Now, on May 20, 1966, and I am reading at the lower part of page

twenty-eight of the F.B.I. resume, the Miami News [360] reported that you, when asked your choice among recruitment in the Army, work in the Army institution as a conscientious objector, or go to jail, you replied, "Let them put me in jail. Damn the fights; forget the money; let them put me in jail."

Now, explain that and— A. (Interrupting) Oh, that was something else where I was condemned by some of my leaders and advisors concerning the teachings of Islam, and I would be lying to sit here and say that I was an angel, or I will be lying to say that I have no fault, or I have never made no radical sounding reports to newspaper writers.

I would be less than a Muslim to tell a lie here in front of the Honorable Judge, on the judging stand, but I did say something like that and I would like to say what I said before I said that.

Q. All right. A. He said to me—he was a real southern —he was from Georgia and he was a real agitating writer who came to Miami to do a write-up and I think he writes for the Miami—what's that, the Miami Sun paper he writes for?

Q. Well, wait a minute; the Miami News. A. Miami News; and he said to me, he said, "Well Champ, it looks like to me you're not the greatest [361] now. Are you going to—how are you going to work your way out of this? Looks like they got you now."

It's not intelligent of a newspaper man to me, the heavyweight champion of the world, not showing that respect for me. He's showing—well, he said, "We got you now. What you going to do about it? What are you going to do? You always bragged about how much money your fight draw. You're always bragging about this; what you going

to do about the money; what you going to do about this and that," and all those kind of things and I just told him, "Damn the money; damn the fighting; damn the movies; damn it all if it means that I'm going to have to go against my God," and I believe I would rather die and go to jail if it means that and if I had to do that as the onliest alternative. So, what do these writers do? I have learned that they ask you a question and then they write the answer, but they don't play the question up, so that was that.

Q. All right; thank you. Now, on page twenty-nine it refers to the Three Star Final edition of the Chicago American at page twenty-three, column one, reporting that the Registrant, that's Muhammad Ali, told close friends he would like to visit wounded veterans, or [361] wounded Viet Nam servicemen in the Great Lakes Naval Hospital on July 5, 1966, and officials of the Great Lakes Naval Hospital, Great Lakes Naval Training Center, Illinois, advise that neither the Registrant nor anybody reportedly representing him had indicated the Registrant would like to visit the wounded Viet Nam servicemen. A. Well, sir; I—

Q. (Interrupting) Was any statement made by you about that? A. No, sir; and I would like to say about it that I did not say that I would like to do this, and not saying that I see nothing bad in going to visit because we have black, white and all kinds that are ill and I go everywhere. I'm the Champion of the World, which is the Jewish, the Christians, Baptist, Catholic, Japanese, Chinese, Russians, white and black, and I would like—I wouldn't mind visiting none of these people because it's my obligation as the Heavyweight Champion of the World but this

goes to show how they can just outright lie, and the fault that they seem to be looking for is awful weak because none of it—ninety per cent of it is just—just ridiculous and no truth in its whatsoever.

Mr. Covington: I believe that is all, Your Honor.

[363] Judge Grauman: When did you first become a conscientious objector to combatant service?

The Witness: Well, sir; I would say as far as the teachings of the Honorable Elijah Mumammad is concerned, I was registered as a Muslin about three weeks prior to the first Sonny Liston fight and then if I had went to any type of a war or done anything morally or spiritually that wasn't in accord with the teachings of the Honorable Elijah Muhammad I would be casted out or severely punished by himself; but I would say I, myself, off paper, as far as being registered as a Muslim is concerned, was a conscientious objector the hour that I first heard the teachings of the Honorable Elijah Muhammad.

Judge Grauman: And give us the approximate date when that hour was?

The Witness: Sir, I would—I couldn't. It's impossible for me to say the exact date and it would be hard to say the month. It was about some time in 1960 or 1961 and may have been November, but Angelo Dundee, my trainer, he would know if he's got the date when I first arrived in Miami, then, because it was a few months after I had gone there—a month—a month after I had gone there—the first month that I was there and I don't know the month. It was a Wednesday night, I know.

Cassius M. Clay, Jr.—Registrant—(By the Court)

[364] Judge Grauman: After you had arrived in Miami and you had gone to hear the Honorable Muhammad Elijah, then in your own mind and conscience you determined that you were a conscientious objector?

The Witness: Well, sir, it wasn't—I didn't go to hear the Honorable Elijah Mumammad. I went to hear his teachings by one of his ministers.

Judge Grauman: Yes.

The Witness: But I would be lying to you if I said to you that at that moment I was determined that I would be a conscientious objector because war was not pending at that time. I had nothing to worry about and I had nothing about war on my mind and all I knew and heard was the truth and I understood it and I believed it, but later—it—later it really ground that—it growed into that and I imagine if you had told me right at that moment, threatenings, I'd probably accepted because my beliefs and my sincerity and my knowledge wasn't strong enough to give me the courage to say, and inspiration to say, "Well, I'll die before I do this."

Judge Grauman: To try to pinpoint it, when, in your own mind and your own heart and your own conscience did you determine that you were a conscientious objector and therefore, were opposed to entering the military [365] service?

The Witness: Well, I would say truthfully, the onliest time that I really thought about it—the onliest time that I was conscientious that I would have to make a decision was the first time that they mentioned going to take a physical my first—the first time I had to go get tested.

Cassius M. Clay, Jr.—Registrant—(By the Court)

Judge Grauman: There are people who are conscientious objectors who are not subject to military service, aren't there?

The Witness: Well, I understand that there are people who—could you repeat that question, sir?

Judge Grauman: Aren't there people who are conscientious objectors who are not subject to military service?

The Witness: Well, I understand that they do have laws that there are people who are conscientious objectors but they don't have to carry guns. They could either wash dishes, or be—

Judge Grauman: You misunderstand me, sir. People who are beyond the age limit or people who are physically incapacitated who are conscientiously objecting to any war or any military service; aren't there people [366] who—many people who are not subject to military service who are conscientious objectors?

The Witness: Well, I really don't know, sir, if I understand the question that good.

Judge Grauman: Don't you have people of the Muslims who couldn't be called into military service under the existing law because of their age and so forth?

The Witness: Oh, you mean ages; of being too old or too young?

Judge Grauman: Yes, sir.

The Witness: Well, I imagine the law has a certain age that you have to before they call you, or between an age where you are too old or either too young. If that's a law, that's true, not only Muslims, but anybody.

Cassius M. Clay, Jr.—Registrant—(By the Court)

Judge Grauman: If I understand you correctly, the first time you think in your own mind and conscience and heart you determined that you were a conscientious objector was when you were called for your first physical examination?

The Witness: That was the—I think, to be plain, what I just told you, if I remember, I said that was the first time that I realized that the [367] decision had to be made. I always believed it and felt it ever since I first heard the teachings, but I didn't have to explain it or even mention and I went for about—in '61 or '62, I went for about three and a half years, going to the meetings and believing this wholeheartedly, but I never even mentioned it to the press. It never got out so I never had a reason to make a decision until then.

Judge Grauman: Well, irrespective of making any decision, what was your sincere conscientious feeling; were you a conscientious objector or were you not?

The Witness: When, sir?

Judge Grauman: Long before you were called for your physical examination.

The Witness: Yes, sir; at heart, yes, sir; but I had no reason to show it.

Judge Grauman: But you actually believed that you were a conscientious objector?

The Witness: I knew I was, sir, after I first heard the teachings of the—how the so-called negro was treated.

Judge Grauman: That was in 1961?

The Witness: Yes, sir.

Judge Grauman: Now, when did you first register for the military draft?

Cassius M. Clay, Jr.—Registrant—(By the Court)

[368] The Witness: I think at the age of eighteen we all have to sign—fill something out.

Judge Grauman: Yes, sir; and you were born when?

The Witness: January 17, 1942.

Judge Grauman: You registered in 1960; is that correct?

The Witness: If I was eighteen at the time; yes, sir.

Judge Grauman: Yes, sir; well, do you recall it being called to your attention that you had become eighteen and therefore, you should register?

The Witness: Yes, sir.

Judge Grauman: Well now, on the registration blank didn't you see a place there for you to sign if you were a conscientious objector?

The Witness: Well, I was not—

Mr. Covington: (Interrupting) May I—excuse me; may I help?

Judge Grauman: Yes.

Mr. Covington: On that registration that question is not asked. It is later when the questionairre is filed; it comes later.

Judge Grauman: Yes, sir; you are [369] right.

Mr. Covington: Excuse me? . .

Judge Grauman: You are so right. You did fill out a questionairre after you registered?

The Witness: I was a Christian at the time, sir. I knew nothing about Islam or what I believed now. I was Cassius Clay. I wasn't Muhammad Ali. I had no knowledge of Muhammad Elijah or Islam and if you had drafted me that day I would have went.

Cassius M. Clay, Jr.—Registrant—(By the Court)

Judge Grauman: When you filled out the questionairre you were or were not a conscientious objector?

The Witness: Was that age eighteen?

Judge Grauman: Well, your questionairre was filled out after you registered. Do you remember when you registered, Mr. Clay?

Mr. Covington: You have your registration card, don't you?

The Witness: No, sir.

Mr. Covington: Oh, I see. I believe Your Honor, it may show on the cover sheet of the draft board file if you will look at the cover sheet.

Judge Grauman: It shows date of [370] registration as April 18, 1960. Date of mailing of the questionairre, they have 3-2-61, and 2-2-61. I am looking for the questionairre. The file isn't in sequence. Well, did you ever at any time, Mr. Clay, until after you had been reclassified, ever indicate to the—

The Witness: (Interrupting) Excuse me, sir; excuse me. I mean not to be disobedient, but I know you are a law, a judge, and I just want to say that it's—the world do know and recognize me as Muhammad Ali and I was just wondering, do I have to be referred to as Clay?

Judge Grauman: No, sir; that is the legal name you were registered under.

The Witness: Registered; oh, I understand.

Judge Grauman: All right, sir; did you ever at any time until you were reclassified from deferred service so that your classification would subject you to be called for service, did you ever advise the Board that you were a conscientious objector?

Cassius M. Clay, Jr.—Registrant—(By the Court)

The Witness: You don't mean in 1960 when I was eighteen; you mean the first time—

Judge Grauman: (Interrupting) No, I mean when—how many times were you called?

[371] The Witness: The first time is when I was turned down.

Judge Grauman: Yes, sir.

The Witness: You mean that time?

Judge Grauman: Yes, sir; and what year was that?

The Witness: I think that was some time around 1964 when I was training for the Liston fight; about '64—a few weeks before the Liston fight, I think.

Judge Grauman: Yes, sir.

The Witness: I didn't tell them that I was a conscientious objector, but I did have a discussion with the local Miami official where I wrote Cassius X. on the paper. He asked me why that was and I explained it and the religion, I wrote Islam instead of Christianity, and the nationality, I wrote Asiatic Blackman instead of negro, and he called me to the back room and he gave me a list of about three hundred something which looked like lists of organizations and said, "Do you belong to any of these? They are subversive groups," or something like that, and I said, "I don't belong to none of them. I'm a Muslim," but he didn't have Islam on that list.

Judge Grauman: Yes, sir; but did you [372] go through the physical examination and did you give them whatever information that they requested of you at the time you were called for your physical examination?

Cassius M. Clay, Jr.—Registrant—(By the Court)

The Witness: I answered everything that the law required me to answer, but as I said earlier, the name, the religion and everything was different.

Judge Grauman: Why didn't you tell them at that time if you were conscientiously a conscientious objector, why didn't you tell them at that time that you were—under the law, couldn't be called into military service if you were a conscientious objector and that you were a conscientious objector?

The Witness: Well, I've been told by my attorney, Mr. Hayden Covington that that was a mistake, that I should have then, but at the time I was about two weeks from the Liston title fight and my manager, Angelo Dundee, Chris Dundee, Milt McDonald, who had invested about $650,000 in the fight, plus many closed circuit T.V.'s were sold out throughout the country, and it was arranged as the biggest fight in all history with Sonny Liston, and I was so disturbed, and working under pressure training for the fight, until I just—all I had on my mind was to obey the law, fill it out, what they had [373] for me to do, and still, I put my name down Cassius X, and I put down I was a Muslim, and I put for religion I was a Muslim—Islamic; I'm no longer Christian, but at the time I saw no need to being truthful, and immediately after that, I'm sure that millions of whites and people who had invested—not me, I fear nothing for money, but they had lost, or they would have lost at least three or four million dollars if I did that, looking back on it, but at the time this wasn't in my mind, at the time I did it, and I was under—just under a strain of the fight and I just filled the thing out and then walked out.

Cassius M. Clay, Jr.—Registrant—(By the Court)

Judge Grauman: Did you understand that if you passed the physical examination that you would be called into military service?

The Witness: Yes, sir.

Judge Grauman: But you said you were under such a strain that you didn't think of calling to their attention at that time that you were a conscientious objector?

The Witness: Well, I immediately—I didn't have much time to worry because they said immediately I had failed the test, but a reopening was going to be held here in Kentucky, which I failed again.

Judge Grauman: Immediately; how [374] long after you took the test?

The Witness: I believe a week or so, two weeks, it seemed like, before I—it was a little after I had beat Liston.

Judge Grauman: Yes.

The Witness: I heard that I failed the test.

Judge Grauman: But after you beat Mr. Liston, were you under any pressure or tension?

The Witness: Yes, sir; because I announced to the world that I was a Muslim then. It was announced to the world then. It was just told to the Board of Miami at the time. They knew I was, but it was quiet.

Judge Grauman: Did you make any announcement that you were then a conscientious objector?

The Witness: No, sir.

Judge Grauman: When is the first time that you ever made an announcement that you were a conscientious objector?

Cassius M. Clay, Jr.—Registrant—(By the Court)

The Witness: I never announced not even up to this date yet that I was a conscientious objector. It was only found out when it was told here in Louisville when my lawyer Ed Jockell filed the papers, and [375] then it was the Board who talked then, and Mr.—I forget his name, but he is the one who said it. I've never outright disrespected the American Government or my draft board by blasting off and bragging and hollering about I'm a conscientious objector. I've never done that.

Judge Grauman: But didn't Mr. Jockell, acting as your attorney under your authority and direction, didn't he present to the draft board and also to the appeals board the claim that you were a conscientious objector?

The Witness: Yes, sir, he did.

Judge Grauman: Well, that was all done with your approval?

The Witness: Yes, sir.

Judge Grauman: Well then, that's what I am trying to get at because the whole question is the sincerity of your claim. I'm trying to get the fact—the first time that there was ever any statement made with reference to your being a conscientious objector—the first time the statement was ever made to the board was after you were reclassified; is that right or wrong?

The Witness: Yes, sir; let me see; the first time I failed I had no need to say anything. They said I wasn't fit. The second time—excuse me; I took [376] the test in Kentucky and they advised me and said I wasn't fit. Then, when they reclassified me I came out with that outburst that was controverse

and then my lawyer went in with the conscientious objector bit and then it was known then.

That was the first time it was known was when he put it in, but I have no need—excuse me, I have no need the first two times that I was called up to, because they never accepted me, but I'm sure that if they had I—as a matter of fact, Allah is my witness here that if they had called me when I was in Miami and I had passed the test then I would have had to do—just say I'm a conscientious objector, but I know nothing about the law and if I knew the right procedures at the time I would have moved accordingly, but I'm new—I'm learning each day about how this appeal and things go, but I didn't know at the time. I had no idea how they worked.

Judge Grauman: Now, you made a statement earlier that you were offered large sums to take a movie part?

The Witness: Yes, sir.

Judge Grauman: And you declined them?

The Witness: Yes, sir. My managers, [376] Bill Faversham of Brown-Foreman Distilling Company could tell you, and Car Davidson of Wyatt, Grafton in the M.E. Taylor Building, and also lawyer Gordon Davidson and Arthur Grafton, they all have the records of monies that we have had to turn down because I couldn't be in movies with women and things that they had set up, and represent and act and me Muslim too, which wouldn't allow me, and also rock and roll records that could have netted easily five hundred thousand, but the type of love song records that I was singing would ruin me as far as being a Muslim minister is being concerned because

we preach against this type of life so therefore, we have to turn it down.

Judge Grauman: According to a statement appearing in this resume of the F.B.I. you are opposed to violence.

The Witness: Yes, sir.

Judge Grauman: Are you opposed to going into non-combatant service where you would not be connected with any violence, but where you would be helping to administer to injured people?

The Witness: Sir, I said earlier and I'd like to again, to make that plain, that it would be no trouble for me to accept conscientious objector on the basis that I'll go into the Armed Services boxing exhibitions [378] in Viet Nam, or traveling the country at the expense of the Government or living in the easy life and not having to get out in the mud and fight and shot and if this—if I could do this, or if it was something I wanted to do, or was in my heart to do if it wasn't against my conscience to do it, I would easily do it. I wouldn't raise all this court stuff and I wouldn't go through all of this and lose and give up the millions that I gave up and my image with the American public that I would say is completely dead and ruined because of us in here now, and so I wouldn't turn down so many millions and jeopardize my life walking the streets of the South and all of America with no bodyguard if I wasn't sincere in every bit of what the Holy Qur'an and the teachings of the Honorable Elijah Muhammad tells us and it is that we are not to participate in wars on the side of nobody who—on the side of non-believers, and this is a Christian country and this is not a

Muslim country, and the Government and the history and the facts shows that every move toward the Honorable Elijah Mumammad is made to distort and is made to ridicule him and is made to condemn him and the Government has admitted that the police of Los Angeles were wrong about attacking and killing our brothers and sisters and they were wrong in Newark, New Jersey, and they were wrong in Louisiana, and the outright, every day [379] oppressors and enemies are the people as a whole, the whites of this nation. So, we are not, according to the Holy Qur'an, to even as much as aid in passing a cup of water to the—even a wounded. I mean, this is in the Holy Qur'an, and as I said earlier, this is not me talking to get the draft board—or to dodge nothing. This is there before I was borned and it will be there when I'm dead and we believe in not only that part of it, but all of it.

Judge Grauman: In your training to become the heavyweight champion of the world, were you taught to try to strike your opponent in such a way as to put him out of commission?

The Witness: Well, I've never really been taught. You can look up Joe Martin, my local boxing trainer here and you can look up Fred Stoner, the negro trainer who used to train at Grace Community Center and they will tell you that and Angelo Dundee, my trainer now; I've never been taught to hit a man direct on no one certain point. No one has ever taught me how to knock a man out and in my professional and amateur record, comparative of fights that I have had, none has really ended as knockouts. Sonny Liston, now, that fight was really

a surprise. I couldn't see it; the fans couldn't see it. It was a lucky punch, and Bryan London was hit with about—he [380] admitted it was not one knockout punch, but it was about twelve rapid punches out in concession, one behind another, but when I go in a ring, my intentions is not to be violent in the way of fighting to kill, or going to war, or hurting no one physically; it's not my faith, and we have a referee in the ring, and I'm known as a scientific fighter and as a fast, classy boxer, and we have three judges and we have an ambulance and we have doctors and we are not one nation against another or one race against another or one religion against another. It's just the art of boxing, and more people get killed in at least ten other sports than they do boxing, but I'm not—I don't consider myself a violent man because next month I will be in the ring with Carl Mildenberger of Germany, prancing and dancing and moving and jabbing and if he hit me low, he'll—points will be taken away and in a war and shoot, you kill, you fight and you kill babies and you kill old ladies and men and there's no such thing as laws and rules and regulations.

Judge Grauman: Don't you use violence in boxing?

The Witness: Mentally, some fighters are violent; mentally, some fighters goes in the ring angry and they have a grudge and they are violent in their approach towards a fellow and many of them lose their [381] head and get beat, but I never get violent. I never lose my head and I'm known for being a calm, cool boxer and I never feel as though I'm

violent and I never fight and act like I'm violent.

Judge Grauman: Are your blows gentle blows or are they blows of violence?

The Witness: Well, I don't consider them blows of violence, not me; I don't consider them blows of violence. Now, football players, they—they elbow each other and they run over each other and they cleat each other and break each other's backs and they are paralyzed, and I don't think that's referred to as intentionally going out to do violence, and as far as hitting a man is concerned, my intention is not to really hurt no one. It's not my intention, but I think when you're violent and in war it's your intention to kill and to hurt and put the other man out.

Judge Grauman: If you are in non-combatant service you have no intention to hurt anybody, do you?

The Witness: Yes, sir, but then sir, that goes back to where we discussed it twice about the Holy Qur'an as far as aiding or participating in any way and as far as the Holy Qur'an and Allah's messenger tells us [382] and it's not something I'm making up and want to believe.

Judge Grauman: From your previous testimony I understand that you regard the Honorable Elijah Muhammad as the spiritual leader of the Nation of Islam?

The Witness: Yes, sir; we regard him as the messenger of Allah, Almighty God, whose proper name is Allah, to us the Lost Found Members of the Nation of Islam who are called negroes, and also a divine spiritual leader and teacher; yes, sir.

Cassius M. Clay, Jr.—Registrant—(By the Court)

Judge Grauman: You regard yourself as an active, sincere, devoted member of the sect?

The Witness: Yes, sir; I—I regard myself as an acting, sincere and devoted member and the Honorable Elijah Muhammad also has made statements to various people who has been interviewing him that I am also not only a sincere follower and believer, but a minister and an international ambassador.

Judge Grauman: Your whole heart and mind are involved in the principles of the Nation of Islam?

The Witness: Yes, sir.

Judge Grauman: Is it or not true that any male member of the Nation of Islam automatically becomes a member of the Fruit of Islam?

[383] The Witness: Well sir, I'm not a Captain. A Captain, such as Samuel here in the audience, could more explain that, but I'm sure that he is automatically one of the Fruit of Islam when he is officially registered as a Muslim and accepts his "X".

Judge Grauman: Do you rely completely on the Honorable Elijah Muhammad for your spiritual counseling?

The Witness: Well, sir, I would say many places I'm not where I can see—come in contact with the Honorable Elijah Muhammad neither by phone nor in person, but it's his teachings and the understanding that we have of his teachings that we solely and one thousand per cent rely on; yes, sir.

Judge Grauman: And has he also advised you that the teachings of the Nation of Islam preclude any member from participating in any form in the military of the United States?

The Witness: No, sir, he never.

Judge Grauman: He has never discussed that with you?

The Witness: No, sir; not in the way where he has advised me to, or even as much as hinted to me that we do not take part in wars. He—he, himself, I've [384] heard him say on many subjects—not war—that if he advised or even aided his followers, he would not know who is sincere or not. So, this is the last thing he would do in any way is to advise or try to strengthen us spiritually in any way on the stand that we have to make.

Judge Grauman: Well, if he directed you to fight in any war, would you follow his command?

The Witness: If the Honorable Elijah Muhammad—

Judge Grauman: Yes.

The Witness: (Continuing)—looked me in my face and he who I believe is directly from Allah, Almighty God Allah, and if he looked at me and advised me, which I'm sure he wouldn't, to fight in any kind of war, if he advised me to I would.

Judge Grauman: And if he would direct you to fight for the United States you would fight?

The Witness: Well, I would—I can speak for him right here and now, that I know he would not say anything like that if he is truly following the Holy Qur'an and what he teaches us that God taught him.

Judge Grauman: But if you were, or if he did so direct you, you have such confidence in him—

The Witness: (Interrupting) Yes, [385] certainly.

Judge Grauman: (Continuing)—that you would do what he directed you to?

Cassius M. Clay, Jr.—Registrant—(By the Court)

The Witness: That's a hypothetical question and I'm saying this; I don't know what hypothetical mean, but I do hear many people say things that sounds kind of impossible, or something is not true.

Judge Grauman: Well, to assume something; that is what a hypothetical question is; to ask you to assume certain things; and what would your answer be if those things existed.

Now, you are right about it being a hypothetical question. If you assume that he would direct you to fight for the United States, the question was would you fight for the United States?

The Witness: Well, first, I would like to say this for myself. I don't believe that, and I would actually say that I could guarantee you my life that he won't advise me to do something like that, but I would say under that, just answering your question the way you are asking, if he did, yes.

Judge Grauman: Now, Mr. Covington has asked you with reference to certain things in the resume of the F.B.I. report. Now, on page twenty-two there is a [386] statement that the nation of Islam was characterized as an all negro organization which was originally organized in 1930 in Detroit. Members believed that the so-called negro slaves of what was referred to as white devils in the United States. Is that correct?

The Witness: Is it correct what?

Judge Grauman: That members believe that so-called negroes or slaves of the white race, referred to as white devils in the United States.

The Witness: Well, we do believe, taking your question like you gave it to me, first of all, number

one, we do believe that the so-called negroes are now economically and mentally are slaves of the white race and we do believe that the so-called negroes, physically, mentally and economically, a hundred or four hundred years ago, and for the last three hundred of those years we were physically, slaves and history shows and proves it white literature, that it's true. Then, as far as the devil is concerned, I answered that a minute ago by saying that it's not just from what I understand from the teachings of the Honorable Elijah Muhammad, it's not just the color of a man's skin that makes a devil. It is the deeds and work that he do, and our leader teaches that the way the so-called negro has been treated, lynched, burned, raped, tarred and [387] feathered for four hundred years and today, still, being shot and killed in front of news medias, and the people who are practicing these acts on us are doing the works of a devil. So, that's what he teaches us and the Honorable Elijah Muhammad is the teacher of Almighty God, Allah, who taught him that these certain natured people who was opressing his people were devils and this is not me. I'm not—I didn't know it six years ago, and the Honorable Elijah Muhammad teaches us you do not know until the coming of Allah and I think that if anyone is a judge of kinds of white devils it should be Honorable Elijah Muhammad and he should be brought before the American Government in Washington, or on nation-wide T.V. and made to prove it, buf I—that part of his teachings is just a grain of sand in a desert compared to what he teaches, but we believe all he have teach and this happen to be one segment

of what we believe, but he is the preacher of it and he is the one that I think should be confronted on why does he teach it to be proven wrong. I'm just a follower and believe what he teach.

Judge Grauman: Now, the practices which have heretofore been mentioned, the Muslim engages in military drill and engaging in judo training; do you approve of those practices?

[388] The Witness: Well, I think the Captain explained that we—that this is a part, and I would like to add to what he said—this is a part in the Holy Bible that teaches that though I dwell in the valleys of the shadow of death I fear no evil, and we are taught by the Honorable Elijah Muhammad that though one dwells more in the shadow of death and the so-called negro is here in the wilderness of North America, so therefore, by Allah, God, teaching the Honorable Elijah Muhammad, and by Allah teaching us to be peace loving people, and by Allah teaching our leader to teach us not to be aggressors but to defend ourselves if attacked, so therefore, since we are so-called negroes, the same as Martin Luther King's followers, the same as Adam Clayton Powell's followers, the same as Ralph Bunch's followers, and Roy Wilkins, James Meredith, and since we all look alike, we can easily be mistaken for one and attacked. So, by our teaching and by we believing in God, whose law is self-preservation, we are taught not to be the aggressor, but defend ourselves if attacked and a man cannot defend himself if he knows not how, and we are taught that not only America, but all countries, all civilized governments have armies and have guns

around their shores, not necessarily to attack or to be the aggressor, but to defend America or our country or [389] whatever it may be if we are attacked. So, we, the Muslims to keep in physical condition, we do learn how to defend ourselves if we are attacked since we are attacked daily through the streets of America and have been attacked without justification for the past four hundred years.

Judge Grauman: Now, you heard the statements here about preparation for the War of Armageddon; what is your viewpoint as to why you are preparing for that war?

The Witness: Well, the Honorable Elijah Muhammad teaches us and I heard him tell Martin Luther King at his dinner table and I have heard him tell Stokley Carmichael at his dinner table and I've heard him tell representatives of Clayton Powell, and representatives of them all that when you are talking about violence you are talking about taking law in your own hands and he says it is impossible for a slave to prepare for a war with his master. It is impossible for us to prepare for Armageddon since we don't make bullets, we don't make guns, we don't make—don't control no food. If we had weapons, if we had machine guns, or that, but we can only fight for so long because we don't control the food factories, so it's foolish for us, or for an intelligent Government to think that we, the ten per cent of America, is hiding in some secret little [389] meeting places in this country preparing to fight these atomic bombs, these jets, these helicopters and all type guns you have that haven't been revealed to the public yet. So, we are not preparing in the way

that whoever wrote that is trying to make it look. We are only preparing for the war of Armageddon divinely. We talk that the battle will be between good and right, truth and falsehood, and we are taught that the battle will be between God and the Devil and so therefore, we hope and pray that we are still here in good standing with the Honorable Elijah Muhammad, for when that hour and day come that we can be told what side to go to. We are trying to be prepared where we can go on the right side, whether it is leaving the country in a helicopter or whether it's leaving the country on a ship, or whether it's leaving the country in those flying saucers that they see over America, and we just hope that we are spiritually and physically and internally and mentally and morally able to get on the side of Allah and the Honorable Elijah Muhammad when Armageddon start, but we can't as much as—our damage, physically, as far as us putting it out in a war would be like a bean shooter running up against a big German tank, so we are only preparing for Allah in spirit—in a spiritual way.

Judge Grauman: In other words, the [390] explanation is there would not be any physical fighting if there was a war of Armageddon?

The Witness: When there is a war of Armageddon that we are talking about there will be a fight.

Judge Grauman: Would you participate in it?

The Witness: No, sir; we won't be participating.

Judge Grauman: In other words, the military training you have would not be military training to engage on one side or the other in the war of Armageddon then?

Cassius M. Clay, Jr.—Registrant—(By the Court)

The Witness: Well, I'm sure that if it will be a physical war we will look foolish with what we call military training, which is judo and learning to wrestle and box and running and in the war of Armageddon which will be a real nuclear war and nothing that judo can do and nothing that karate can do or take part in, so therefore, this is for our health and self defense while we are here if we are attacked, but when Armageddon itself comes it will be physical; God will be physical; his equipment will be physical and the enemies of God, their equipment will be physical, but we ourselves won't participate in [391] putting out physical energy ourselves.

Judge Grauman: All right, Mr. Covington.

Mr. Covington: Yes, Your Honor; now, if it please Your Honor, at this point, we desire to submit a letter of transmittal of various identifying documents for what they may be worth; signed statements by members of the Islamic Faith and also non-Islamic members, as to the bonafides and good faith and consistent conduct of the Registrant, Muhammad Ali, to Your Honor for what it may be worth and if I may, I will call them off quickly;

My letter of transmittal identifying them, a statement from Muhammad Ali, dated August 15, 1966, addressed to the Appeals Board of the Department of Justice;

A statement from the Honorable Elijah Muhammad dated July 28th, addressed to the same, the Selective Service System and the Department of Justice;

A letter of August 1, 1966, addressed to the same, signed by Mr. Chauncey Eskridge on the law stationery of his firm in Chicago;

A statement by Dr. Charles Williams, addressed to the same, dated August 1st;

A statement signed by Robert "X" Thompson and a large number of other people of the Los Angeles Muhammad [392] Mosque No. 27;

A statement signed by Charles 18X Collins of Los Angeles Muhammad Mosque No. 2, and several others;

A statement made by the Presiding Minister of Mosque No. 27, dated July 29, 1966;

A statement made or signed by Kenneth C. X. Jefferson, Muhammad Mosque No. 1, Detroit, Michigan, addressed to the same;

A statement dated July 29th from Muhammad Mosque No. 1, addressed to the same, signed by Philbert Omar;

A statement addressed to the same from Muhammad Mosque No. 12, Philadelphia, Pennsylvania, July 29th, signed by Chauncey X. Lassiter and a number of other persons;

A statement of Jeremiah Shabazz, dated July 29, 1966, to the same;

A statement by Darlene X. Jones, dated July 29, 1966, addressed to the Selective Service System and the Department of Justice;

A statement of July 29th, from Muhammad Mosque No. 3, Milwaukee, to the same, signed by Clarence X Reed and others;

A statement by Henry X. Allen, Presiding Minister of Mosque No. 3, in Racine, Wisconsin, addressed to the same;

A statement signed by Milton X. Howard, dated July 29th, 1966, addressed to the same and signed by him [393] only.

A statement signed by Lonnie Shabazz, dated July 29th of Muhammad Mosque No. 4;

A statement dated July 29th, addressed—well, signed, rather, by Delta X. Pitts, addressed to same;

A statement, and I'm going to save the time of the reporter, now, signed by Portia Pasha and a number of other persons;

A statement signed by David X. Bradley and a number of other persons from Cincinnati, Ohio;

A statement signed by David X. Bradley, dated July 29th;

A statement signed by Samuel X. Saxon, and others from Miami;

A statement signed by Ruby 2X Saxon, dated July 29, 1966, and others;

A statement signed by William Lucius Bey dated July 29, 1966;

A statement signed by William 7X Strand and others of Boston, Massachusetts;

A statement signed by Samuel Gibson, or rather James Gibson and a number of others;

A statement signed by Don X. Straughter and a number of others;

A statement of Issiah Karren dated July 29th of [394] 1966.

A statement signed by Junius X. Wood, dated July 29, 1966.

A letter signed by James 4X Pollitt, and others of Baltimore, Maryland;

A letter, James McAllister and others of Baltimore, Maryland;

A statement by Louis Farrakhan, Presiding Minister, Mosque No. 7.

A letter signed by John Ali, of Mosque No. 2, Chicago, Illinois; the secretary—International Secretary of the Muslim organization;

A statement of Al Mann, who incidentally is a professional basketball player and Muslim of Chicago, Illinois, dated August 1, 1966;

A statement dated August 1, 1966, signed by Eugene Majied, and these we submit to the Honorable Hearing officer for what they may be worth in connection with the disposition of this matter.

Also, may I say, Your Honor, that we are grateful to you for the patience that you have shown with us this afternoon and this is the last of our submissions.

Judge Grauman: Do you care, orally or in writing to say anything else?

Mr. Covington: Well, Your Honor, I [396] feel that there are some matters that I would like to submit in a letter, if I may, when I get back.

Judge Grauman: You will be accorded that privilege; as soon as you can expeditiously do it.

Mr. Covington: I will do it very promptly. I want to cite Your Honor some cases by the courts that relate to the way that this type of material that I took exception to on the newspaper thing is dealt with. I have a 10th Circuit Court of Appeals opinion and I don't have the citation at hand that I will write up and give you.

Judge Grauman: All right; is there anything else you want to offer in further support of your position?

Mr. Covington: Well, I just have nothing else to say except that I am very pleased that I have ap-

peared before you and secondly, I am quite proud to be representing this Registrant.

Judge Grauman: Mr. Covington, as I understand, the sole question under the law—

Mr. Covington: (Interrupting) Is one of sincerity.

Judge Grauman: And the burden is on the Registrant.

[397] Mr. Covington: That right.

Judge Grauman: All right; if there is nothing further, we will adjourn.

* * * * * *

STATE OF KENTUCKY,
COUNTY OF JEFFERSON, *ss.*:

I, CHARLES L. STERLING, Notary Public, State of Kentucky at Large, hereby certify that the foregoing Transcript of Proceedings was taken down at the time and place stated in the caption; that the said transcript of proceedings was taken down by me in stenographic notes and thereafter reduced under my supervision to the foregoing one hundred twenty-nine typewritten pages; and that said typewritten transcript is a true and accurate and complete record of my stenographic notes so taken.

I further certify that I am not related by blood or marriage to any of the parties hereto and that I have no interest in the outcome of the captioned matter.

My commission as Notary Public expires April 2, 1970.

Given under my hand, this the 23rd day of September, 1966, at Louisville, Kentucky.

.....

Notary Public, State at Large.

Department of Justice Advice Letter

[209]

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

[Emblem]

Address Reply to the
Division Indicated
and Refer to Initials and Number

Nov. 25, 1966

Chairman, Appeal Board
Western District of Kentucky
Selective Service System
1405 West Broadway
Louisville, Kentucky 40203

Re: Cassius Marcellus Clay, Jr.
Conscientious Objector

Dear Sir:

As required by Section 6(j) of the Universal Military Training and Service Act, as amended, an inquiry was made by the Department of Justice in the captioned matter and an opportunity to be heard on his claim for exemption as a conscientious objector was given to the registrant by Judge Lawrence S. Grauman, a Hearing Officer for the Department of Justice.

The information obtained from the inquiry and considered by the Department of Justice in arriving at its recommendation is contained in the Resume of the Inquiry attached hereto and made a part hereof.

Registrant was born in Louisville, Kentucky on January 17, 1942. He graduated from Central High School in Louisville, Kentucky in June 1960. His father is a

Methodist. His mother is a Baptist and the registrant was reared in the Baptist faith until he became interested in the Muslim faith.

The Registrant registered for Selective Service on April 18, 1960. His local board classified him in Class I-A on March 9, 1962 but, following an Armed Forces physical examination, registrant was found not acceptable for induction under then current standards and was classified I-Y. At the request of the Department of the Army, [210] the registrant was ordered to appear for a further Armed Forces physical examination on March 13, 1964. He was again found not acceptable for induction under then current military standards and was again classified in I-Y on March 26, 1964.

Thereafter, I-Y registrants were considered for induction, without further physical examination, and on January 28, 1966 the registrant was found to be fully acceptable for induction into the Armed Forces by the Commander of the Joint Examining and Induction Station at Louisville, Kentucky. The local board then classified the registrant I-A on February 17, 1966. On February 18, 1966, the local board sent him a SSS Form 150, Special Form for Conscientious Objector. He executed and returned the form to the local board where it was received on February 28, 1966. Registrant was granted a personal appearance before the local board, and following that appearance on March 17, 1966, the board retained him in Class I-A. He appealed on March 28, 1966.

Registrant had not claimed conscientious-objector status prior to February 1966. In his Classification Questionnaire, received by his local board on March 13, 1961, the registrant made no claim of conscientious objection, and he answered "None" to the questions relating to status as

a minister or student preparing for the ministry. His occupation was given as professional boxer and he gave as prior work experience, "Wining the World Light heavy Weight Olympic Boxing Champion at Rome." [Sic]. In his Special Form for Conscientious Objector, filed in February 1966, as noted above, he claimed that he became a member of Muhammad's Mosque No. 2 in Chicago, Illinois by confession of faith in January 1964, and also claimed membership in Muhammad's Mosque No. 29, Miami, Florida. He also claimed conscientious objection and exemption from combatant and noncombatant military training and service. His signature to that form appears as "Muhammad Ali, Slave Name Cassius M. Clay, Jr."

[211] Annexed hereto and made a part hereof are Exhibits A-1 through A-36;[1] Exhibit B, the Newspaper, *Muhammad Speaks*, issue of August 26, 1966; Exhibit C, the Holy Qur'an, translation by Maulana Muhammad Ali, 1963; and Exhibit D, the book "Message to the Blackman" by Elijah Muhammad, 1965. These exhibits were submitted to the Department of Justice Hearing Officer on behalf of the registrant by his counsel and identified on pages 125 through 128 of the transcript.

The registrant appeared before the Hearing Officer at Louisville, Kentucky on August 23, 1966 accompanied by counsel, registrant's mother and father, an assistant minister of the Muslim organization and his tax attorney. The proceedings, which largely consisted of questions propounded by registrant's counsel, were recorded and a copy of the transcript is submitted herewith. The registrant ac-

[1] These exhibits deal primarily with the ministerial claim but were received and considered by the Hearing Officer for whatever bearing they might have upon registrant's conscientious-objector claim only.

knowledged having received a copy of the resume and his objections thereto are contained in the transcript. The original of the transcript has been furnished to registrant's counsel, Mr. Hayden C. Covington, 34-44 76th Street, Jackson Heights, New York, N. Y. 11372. Mr. Covington has requested that registrant's mail be sent to him at the above address.

The Hearing Officer reported that the registrant stated his views for about one hour in a convincing manner; that he answered all questions propounded to him forthrightly; that there was no evidence of trying to [212] evade the Hearing Officer's questions; and that he was impressed by the registrant's statements. The Hearing Officer considered a letter from the registrant to his local board dated February 14, 1966 and quoted the following passage therefrom:

> "3. That I am a devoit Muslim and a follower of Islamic religious faith under the discipline of the prophet Elijah Muhammad. To bear arms or kill is against my religion and I conscientiously object to any combat military service that involves the participation in any war in which the lives of human beings is taken. This I do not believe to be rightous. This has been my faith upward of five years." [sic]

The Hearing Officer reported that the registrant's tax attorney, who is not a member of the Muslim organization but has known registrant since 1964, and another witness, who is an assistant minister in the Muslim organization, stated that the registrant had acted as a minister in the field for the Muslim organization and they believed the registrant to be sincere in his conscientious-objector claim. Registrant's mother, who is still a Baptist, testified that in 1960 or 1961 registrant became interested in the Muslim

faith. Both registrant's mother and father stated that the registrant had told them that he would die for his faith.

The Hearing Officer believed that the resume indicated that the registrant was of good character, morals and integrity. He pointed out that a representative of Central High School, which the registrant had attended, expressed the opinion, page 2 of the resume, that the registrant is not sincere in his conscientious-objector claim; that a [213] representative of the Department of Recreation, Louisville, Kentucky, who was closely associated with the registrant until registrant was 18 years of age, page 3 of the resume, believed that the registrant's whole life was boxing and becoming a boxing champion and he did not believe that the registrant is sincere in his conscientious objection.

In considering the resume, the Hearing Officer appeared to give great weight to the statement of an attorney for the group in Louisville sponsoring the registrant's professional boxing career,[2] and also a statement by a member of the

[2] With respect to that statement, the Hearing Officer observed that the attorney had suggested in 1964 that the registrant join the reserves rather than wait to be drafted and had explained the danger of the registrant's professional boxing career in claiming conscientious objection and [214] affiliating with the Muslims; that the registrant had replied that he was going to follow the dictates of his conscience and claim conscientious objection; that the registrant was prevailed upon not to file his conscientious-objector claim at that time, but the attorney was convinced that the registrant would have filed his conscientious-objector claim at that time if he had not failed to pass his Armed Forces physical examination. The attorney stated that the registrant had been warned that his affiliation with the Muslims would cost him one million dollars and that the registrant had replied that his religion meant more to him than money and whether or not the public might like him. The Hearing Officer reported that the attorney related an incident which occurred in January 1966 in which the registrant was offered $300,000 to play the title role of a movie to be made in Hollywood based upon the life of Jack Johnson, the

sponsoring group.[3] Neither of them testified at the hearing. The Hearing Officer reported that the attorney was known personally to the Hearing Officer and he knew him to be a man of unimpeachable character who stands high in his profession. He stated that he does not personally know the sponsor but that he knows the reputation of the sponsor in the community and that he is regarded as a man of outstanding character. He reported that the attorney and the sponsor would no longer have any financial interest in the registrant's professional career when the existing contract with the sponsors expired, and that the registrant had announced to the press that he would not renew the contract with the present sponsoring group. The Hearing Officer stated that he knew of no reason why complete credence should not be given to the opinions of these two individuals to the effect that the registrant is sincere in his conscientious objection.

[215] The Hearing Officer concluded that the registrant is sincere in his objection on religious grounds to partici-

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former heavyweight boxing champion; that the registrant turned down the offer because Jack Johnson, who married a white woman and had the reputation of being a heavy drinker and of poor character, stood for everything the registrant was against. The attorney expressed the opinion that the registrant sincerely believes that he is conscientiously opposed to military service.

[3] As stated by the Hearing Officer, that statement is to the effect that the sponsor expressed the opinion that Malcolm X was the individual responsible for registrant's becoming a Muslim; that the registrant had suffered heavy financial loss through his association with the Muslims; that he originally thought that the registrant claimed conscientious objection because he did not want to serve in the army, but that he is "becoming more convinced every day that the registrant is sincere in his claim and motivated solely by a conviction of conscience that he cannot participate in any matter involving killing."

pation in war in any form and he recommended that the conscientious-objector claim of the registrant be sustained.

It should be noted that while the resume statement of the attorney for the sponsoring group did, as noted by the Hearing Officer, express the opinion that registrant sincerely believes that he is conscientiously opposed to military service, the resume also reflects that the attorney believed that registrant would be sincere in his claim as a conscientious objector "to the extent that registrant can be sincere in a belief". The resume further reflects that the attorney "could not be sure how deep any human conviction goes with the registrant" and that he is "not certain as to what motivates the registrant in this respect." (Resume, page 5) The attorney added that in view of his past experiences with the registrant changing his mind, he would not be surprised "if a year from now the registrant becomes disenchanted with the Muslims and voluntarily joins the United States Marines." The member of the sponsoring group, it should also be noted, stated that "I'll go to my grave believing registrant basically is a good boy and was brainwashed first by his father and then by the Muslims." (Resume, page 7)

The registrant's claimed conscientious objections appear to be based essentially upon the teachings of the Nation of Islam as interpreted by Elijah Muhammad, and registrant's expressed objection to participation in the Vietnam war.

In his Special Form for Conscientious Objector, received by his local board on February 28, 1966, registrant stated that he became a member of the Nation of Islam in January 1964 by confession of faith; that he is a member, believer and follower of that sect (Series IV), [216] and

that he relies most upon the Hon. Elijah Muhammad of Chicago, Illinois for religious guidance (Series III).

In his personal appearance before his local board on March 17, 1966 the registrant stated among other things that his religion teaches its adherents not to take part in any way with infidels or any nonreligious group. He said that they pray five times a day facing the East; that they fight only in self-defense, not war; that their group has their own police force and no Muslim may carry any lethal weapon; and that Elijah Muhammad is their leader.

In paragraphs (4) and (5) of his letter dated August 15, 1966 to the Appeal Board, the registrant further expressed his reliance upon Elijah Muhammad when he said:

> "Spend time with Elijah Mumammad receiving his instructions and making notes of his orders to me as to how to more effectively and efficiently carry out my ministerial duties.
>
> "Spend time each day or evening before retiring studying the book by the Honorable Elijah Muhammad entitled 'Message to the Blackman' . . ."

In answer to a question by the Hearing Officer at registrant's hearing on August 23, 1966: "Do you rely completely on Honorable Elijah Mumammad for your spiritual counseling?" the registrant stated:

> "Well, sir, I would say many places I'm not where I can see—come in contact with the Hon Elijah Muhammad [217] neither by phone nor in person, but its his teachings and the understanding that we have of his teachings that we solely and one thousand percent rely on; yes, sir." (Transcript, page 116)

Department of Justice Advice Letter

Elijah Muhammad, whom the registrant listed as a reference as well as the person upon whom he relies most for religious guidance, is reported in the resume as stating that he is the spiritual advisor of the registrant, that he had explained the teachings of the Nation of Islam to the registrant, and had advised him that the teachings preclude any member of the Nation of Islam from participation in any form of military service "of the United States". (Resume, page 19) Similarly, other coreligionists stated, resume pages 20 and 21, that the Nation of Islam's religion prohibits service in the military "of the United States". These statements do not appear to preclude military service in any form, but rather are limited to military service in the Armed Forces of the United States.

Registrant introduced into evidence at the hearing two documents containing Elijah Mumammad's interpretations of the teachings of the Holy Qur'an, the newspaper *Muhammad Speaks* and the book, "Message to the Blackman". The newspaper *Muhammad Speaks*, issue of August 26, 1966, page 28, contains the following statement (which also appears in substantially the same form in "Message to the Blackman", page 164):

> "WE BELIEVE that we who declare ourselves to be righteous Muslims, should not participate in wars which take the lives of humans. We do not believe this nation should force us to take part in such wars, for *we have nothing to gain* [218] *from it unless America agrees to give us the necessary territory wherein we may have something to fight for.*" (Emphasis added.)

Both "Message to the Blackman" and *Muhammad Speaks* express essentially the view of the Black Muslims that the white man is their enemy, and that the black man should

disassociate himself from the United States Government and its institutions and secure an independent nation for the black man within the United States.

It seems clear that the teachings of the Nation of Islam preclude fighting for the United States not because of objections to participation in war in any form but rather because of political and racial objections to policies of the United States as interpreted by Elijah Muhammad.

Asked by the Hearing Officer, whether the registrant would fight in any war which Elijah Muhammad directed him to fight in, the registrant replied that if Elijah Muhammad:

> "looked me in my face and he who I believe is directly from Allah, Almighty God Allah, and if he looked at me and advised me, which I'm sure he wouldn't, to fight in any kind of war, if he advised me to I would." (Transcript, page 117)

The registrant testified as follows concerning his objections to participation in noncombatant service:

> "Sir, I said earlier and I'd like to again, to make that plain, that it would be no trouble for me to accept conscientious objector on the basis [219] that I'll go into the Armed Services boxing exhibitions in Viet Nam, or traveling the country at the expense of the Government or living in the easy life and not having to get out in the mud and fight and shoot and if this—if I could do this, or if it was something I wanted to do, or was in my heart to do if it wasn't against my conscience to do it, I would easily do it. I wouldn't raise all this court stuff and I wouldn't go through all of this and lose and give up the millions that I gave up and my image with the American public that I would

say is completely dead and ruined because of us in here now, and so I wouldn't turn down so many millions and jeopardize my life walking the streets of the South and all of America with no bodyguard if I wasn't sincere in every bit of what the Holy Qur'an and the teachings of the Honorable Elijah Muhammad tell us *and it is that we are not to participate in wars on the side of nobody who—on the side of nonbelievers, and this is a Christian country and this is not a Muslim country,* and the Government and the history and the facts shows that every move toward the Honorable Elijah Muhammad is made to distort and is made to ridicule him and is made to condemn him and the Government has admitted that the police of Los Angeles were wrong about attacking and killing our brothers and sisters and they were wrong in Newark, New Jersey, and they were wrong [220] in Louisiana, and the outright, everyday oppressors and enemies are the people as a whole, the whites of this nation. So, we are not, according to the Holy Qur'an, to even as much as aid in passing a cup of water to the—even a wounded. I mean, this is in the Holy Qur'an, and as I said earlier, this is not me talking to get the draft board—or to dodge nothing. This is there before I was borned and it will be there when I'm dead but we believe in not only that part of it, but all of it." (Transcript, pages 110-112) (Emphasis added.)

It is therefore our conclusion that registrant's claimed objections to participation in war insofar as they are based upon the teachings of the Nation of Islam, rest on grounds which primarily are political and racial. These constitute only objections to certain types of war in certain circum-

stances, rather than a general scruple against participation in war in any form. However, only a general scruple against participation in war in any form can support an exemption as a conscientious objector under the Act. *United States* v. *Kauten*, 133 F.2d 703.

The registrant has expressed his objections to the particular war in Vietnam. Following the reclassification of the registrant from I-Y to I-A on February 17, 1966, the *Chicago Daily News* quoted the registrant as stating, pages 26 and 27 of the resume:

> "I am a member of the Muslims and we don't go to no war unless they are declared by Ali himself. I don't have no personal quarrel with those Vietcongs."
>
> * * * * *
>
> [221] "Let me tell you, we Muslims are taught to defend ourselves when we are attacked. Those Vietcong are not attacking me. These Vietcong are fighting a very nasty war over there. There is a lot of people getting killed. Why should we Muslims get involved? Besides, I am fighting for the government every day. I am laying my life on the line for the government. Nine out of ten soldiers would not want to be in my place in the ring. It is too dangerous." [sic]

Questioned at the hearing whether he made that statement, the registrant admitted he had, although he stated that he had been condemned by Elijah Muhammad for making "such a wild boastful statement". (Transcript, pages 88 and 89)

A month after making the above quoted statement, the registrant also told his local board, according to its summary of his personal appearance, that he "objects to being

in service because he has no quarrel with the Viet Cong."

It would seem from these remarks made by the registrant immediately after his having been classified I-A in February 1966, that his claimed objections to military service are based in part upon an objection to fighting the Viet Cong, with whom he has no "personal quarrel", and to his objection to the Muslims getting involved in the Vietnam war.

Here again the registrant fails to meet the requirements of the Act. Neither the fact that he has no "personal quarrel" with the Viet Cong nor his related objection to the Black Muslims getting involved in the [222] Vietnam war constitute an objection which the Act recognizes. To qualify for exemption as a conscientious objector, the registrant's objection must be a general scruple against "participation in war in any form", not merely an objection to participation in a particular war. *United States* v. *Kauten*, 133 F.2d 703.

Moreover, the registrant has not consistently manifested his conscientious-objector claim. Such a course of overt manifestations is requisite to establishing a subjective state of mind and belief. As noted earlier, he made no conscientious-objector claim at all prior to being re-classified I-A in February 1966. Even after that event, the record of his efforts to have the local board reconsider his classification indicates that the registrant's primary concern was not his conscientious-objector claim, but the financial hardship which would result from his induction into the Armed Forces.

In his letter to the local board on March 17, 1966, registrant stated that his classification from I-Y to I-A is legally unjustified and imposes "grave hardship upon me as heavyweight champion of the world at now age 24."

Department of Justice Advice Letter

In another letter to his local board, dated April 16, 1966, registrant discusses financial obligations and commitments, including money which he owes the Louisville Sponsoring Group, which he made during the time he was I-Y and before he was classified I-A. He stated:

> "Two years is a very long time in the life of a heavyweight champ—from age 22 when I was classified from I-A to I-Y, and my present age 24 to age 26 I may never be able to overcome this time of loss of boxing sharpness and come back from the service to earn the kind of money [223] required to pay off these financial obligations, even though they may be abated during the time of military service. I would therefore be in hock for the rest of my life, whereas if I can get in a few more fights, which are lined up through the fall of this year, I should be able to settle these permanent financial obligations from the money I should get within this year, while I am at my peak of shape and am the Heavy weight champion of the World. A 6-month defense is necessary to retain the title."

In the same letter, he referred to the hardship points expressed in his prior letters of March 28, 1966 and February 14, 1966 and stated:

> "I press the hardship cause in two different aspects: (a) I am the sole support of my mother who is one of my dependants. (b) My wife I am required by Court decree to support in the sum of $150,000 in payments of alimony . . ."

The main thrust of registrant's letters to his local board following his reclassification from I-Y to I-A appears to be more of an argument for one of several classifications

other than I-A, rather than valid support of his conscientious-objector claim. In his 8-page letter of April 16, 1966, he devotes three and one-half pages to a discussion of why he should not have been classified from I-Y to I-A. He stated, among other things:

> "There is nowhere any indication that standards of the American Army combat [224] capabilities have been modified to make psychologicial rejects as 'myself' now acceptable as found under any applicable standards based or tested since my last rejection and my first classification to I-Y. If I was that bad and unfit then for the true reason given I should have been classified 4-F and not I-Y or I-A."

On page 8 of the letter the registrant protested that there was "every reason in my file on March 17, 1966 when I appeared before the [local board] to discuss my file and my religious beliefs and objections as contained in my conscientious-objection questionnaire, for the local board to have re-classified me I-A-O, I-O, I-W, I-Y, II-A and/or III-A." His last complaint was to the effect that "All this rush to make me I-A triggered a whole national mess which and wherein I became embroiled and made the target of politicians and super flag-wavers, causing my last fight a fortune in losses of revenue to me and the governments in taxes. I should be in Class III-A."

Registrant had legal counsel throughout the period of the correspondence with his local board referred to above.

It should also be noted that the registrant did not claim conscientious-objector status until after he had been reclassified I-A in February 1966, although in his testimony at the hearing he variously fixed the time when he became a conscientious objector as: 1) three weeks before the first

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Sonny Liston fight on February 25, 1964 (Transcript, page 96), 2) the hour when he first heard the teachings of Elijah Muhammad in November 1960 and 1961 (Transcript, page 96), 3) "the first time I had to go get tested" (Transcript, page 98), and 4) "after I first heard the teachings of the—how the so-called Negro was treated." (Transcript, page 100).

[225] He explained to the Hearing Officer that he did not claim to be a conscientious objector when he first became one because war was not pending at that time and he had nothing about war on his mind. (Transcript, page 97) But, a registrant has not shown overt manifestations sufficient to establish his subjective belief where, as here, his conscientious-objector claim was not asserted until military service became imminent. *Campbell* v. *United States*, 221 F.2d 454. *United States* v. *Corliss*, 280 F.2d 808, *cert. denied*, 364 U.S. 884.

The burden of clearly establishing his conscientious-objector claim is upon the registrant. *Swaczyk* v. *United States*, 156 F.2d 17, *cert. denied*, 329 U.S. 726. The Department of Justice concludes that this registrant failed to sustain that burden.

With due regard for the recommendation of the Hearing Officer, the Department of Justice finds that the registrant's conscientious-objector claim is not sustained and recommends to your Board that he be not classified in Class I-O or in Class I-A-O.

The Selective Service Cover Sheet in the above case is returned herewith.

Sincerely,

/s/ T. Oscar Smith
T. Oscar Smith
Chief, Conscientious-Objector Section

[226]

FBI Resume

Resume of the Inquiry
Re: Cassius Marcellus Clay, Jr.
Conscientious Objector

Registrant was born January 17, 1942 in Louisville, Kentucky. He is a member of the Nation of Islam.

A representative of Central High School, Louisville, Kentucky, advised that the registrant entered Central High School in the 10th grade on September 4, 1957, having completed the 9th grade at DuValle Junior High School. On March 31, 1958 registrant voluntarily withdrew from Central High School. No reason for the withdrawal is shown on the records but the records reflect that during the 1957-58 school year, registrant made poor grades. Registrant re-entered Central High School in September 1958 and remained until he graduated on June 11, 1960. He ranked 376 in a graduating class of 391. His average grades for the 9th, 10th, 11th and 12th years were 72.7. Registrant's IQ test score in 1957 was below average. Registrant's attendance at school was rather irregular. Registrant was rated as fair with respect to emotional control; he was rated fair as to leadership; above-average as to health; average as to intellectual ability, initiative, social attitude, effort, honesty, scholastic zeal. Registrant participated in tennis in 1958-59 and chemistry craft in 1959-60. This official advised that general information around the school was that registrant was primarily interested in boxing and not in school. He was an amateur boxer at the time he was in high school and participated in Golden Gloves activities. A teacher advised that he considers registrant's family a fine family and was particularly commendatory concerning the registrant's mother. Registrant's grand-

mother exerted a strong influence on registrant's family and she was an outstanding [227] woman. Registrant presented no disciplinary problem while attending Central High School. Registrant was a "happy-go-lucky" kid. Registrant's primary interest was in boxing. During registrant's school years there was never any reason to question his honesty and he was not the "pugnacious-type" individual. He had a likeable personality and was well-liked and respected by other students. This teacher characterized the registrant as an extrovert and his brother to be an introvert. Registrant was considered to be average with respect to religion. He never indicated that he had any interest in the Islam religion. This teacher believes registrant is sincere and honest with respect to his Islam beliefs and that "someone sold the registrant completely" with respect to the Islam religion. This teacher expressed the opinion that if the registrant has claimed that he is conscientiously opposed to military service this is a sincere claim and not for the purpose of avoiding military service. Another teacher recalled that during the high school years registrant was very well-liked by other students. During those years he was "a loveable boy—just a big good-natured kid." This teacher never observed any particular religious activities by the registrant. There was no indication that he was other than a normal high school student whose primary interest, however, was in boxing. This teacher advised that, in his opinion, the registrant has always been of good character with respect to matters of morals, integrity, and the like. Registrant never dissipated physically. He noted that during registrant's youthful years he was just a big good-natured boy and this teacher was convinced that he would have remained so to this date if someone, say, "of the Black Muslims had

not given him an injection of the hate stuff." This teacher expressed the view that the only way that he could give registrant credit for being sincere in a claim as a conscientious objector is to consider registrant as being exceedingly stupid. This teacher stated that he doesn't think that registrant is that stupid and therefore concludes that the registrant is not sincere in his conscientious-objector claim. He stated that he [228] could not reconcile registrant's profession as a heavyweight boxer with his conscientious-objector claim.

A representative of the Louisville, Kentucky Department of Recreation recalled that when the registrant was about 12 years of age he began participating in the boxing program of the Department. This official stated that he was very closely associated with the registrant until the registrant was 18 years of age. He stated that during the time that he was associated with the registrant he was a good, honest, clean-living boy. He never drank, smoked, ran around with girls or used profanity. His whole life was boxing and becoming a boxing champion. During this period of time the registrant did go to church and, although not an overly religious boy, did believe in an Almighty Being and lived accordingly. This official stated that he could not believe the registrant can be sincere in any claim that he is conscientiously opposed to military service. Such a claim just didn't square with his knowledge of the registrant during the time that he was in almost daily contact with him. He recalled that when the registrant registered with Selective Service he made no statement indicating that he was conscientiously opposed to such service. This person noted that he had heard that registrant's father disliked individuals of the white race. A business associate of the registrant in Louisville recalled

that when he first became acquainted with the registrant the registrant was 17 years of age. He was a polite young man with no known character defects with respect to such matters as morals, honesty and integrity. He recalled that when the registrant was 18 years of age it was suggested to him that possibly his career might be helped if he would join some type reserve unit of the military service and fulfill his military obligation in that manner rather than waiting to be drafted. Registrant did not want to do this but he did not make any statement either pro or con as to his personal feelings with respect to military service. [229] This associate recalled that the first time he learned of registrant's personal feelings about military service was in February 1964 when the registrant telephoned him and stated that he was going to follow the dictates of his conscience and claim exemption from military service because he was conscientiously opposed to such service. Registrant was urged by his business associates not to announce his intention of filing a claim as a conscientious objector but instead should go ahead and proceed with the possible induction process. Registrant was prevailed upon not to file a conscientious-objection request at that time. This associate recalled that eventually the registrant was examined and was found not acceptable for military service on mental grounds. He stated as a result the registrant did not at that time file a conscientious-objector claim but this associate is convinced that as of that time the registrant would have filed a conscientious-objector claim had it not been for this associate's intercession. This associate thought the registrant first became interested in the Muslims in about 1962 in Chicago. He thought the registrant possibly first learned of the Muslims through his brother. This associate recalled that in February 1964

a group of registrant's associates explained to him that his association with the Muslims would cost registrant at least a million dollars which he could otherwise earn. The registrant was recalled to say, "I want to tell you now that my religion means more to me than money and whether or not the public may like me. Nothing you have said makes me change my mind and nothing anyone will ever say will change my mind." This associate expressed the opinion that the registrant had thrown away many financial opportunities because of his Muslim association and noted a specific incidence in which the registrant had declined to play the role of Jack Johnson in a film. Registrant noted that Johnson stood for everything that he himself was against. It was also noted that the registrant was unable to get a fight in the United States because of his Muslim association. He noted that the registrant had been [230] the sole support of his parents for some years and has been supporting his brother. Registrant is also heavily burdened because of alimony payments to his ex-wife. This associate noted that registrant's general morals, ethics and relationships with people are above average when one takes into consideration the fact that as a young Negro boy the registrant did not have the same opportunities as a white boy might have had. Registrant has no character defects so far as honesty or integrity may be concerned. This associate thought registrant's character qualifications had changed very little since he first met the registrant. Registrant has always been a "nonviolent kid." He had never known the registrant to initiate an act of violence. He recalled several instances of registrant being provoked by verbal abuse but the registrant did not react violently. This associate considers registrant "a very tender boy" and one who loves children. Registrant had told this asso-

ciate he divorced his wife because she did not adhere to his Muslim beliefs. This associate expressed the opinion that the registrant would be sincere in his claim as a conscientious objector to the extent that the registrant can be sincere in a belief. This associate could not be sure how deep any human conviction goes with the registrant. He thinks the registrant sincerely believes that he is conscientiously opposed to military service but he is not certain as to what motivates the registrant in this respect. In view of his past experiences with the registrant changing his mind, this associate stated that he would not be surprised "if a year from now registrant becomes disenchanted with the Muslims and voluntarily joins the United States Marines." Another business associate of the registrant in Louisville who had known him since 1960 advised that the registrant's character with respect to morals, honesty, and integrity has always been sound. Registrant was never one to drink intoxicating beverages, or to smoke, and was not a girl chaser. There were never any indications of registrant's being dishonest or untruthful in important matters. [231] This associate recalled that during the early years of his acquaintance with the registrant, registrant was not a particularly religious individual but he was perfectly normal in this respect and while he probably didn't attend church regularly he did believe in an Almighty Being. During the first several years of their association, "religion did not play a big part in registrant's life" because his entire interest was in boxing. This associate thought the registrant became affiliated with the Muslims shortly before February 1964. This associate recalled a conference with the registrant in 1964 at which it was explained to the registrant that his association with the Muslims was costing him financially and the registrant replied that his religion

meant more to him than anything, including money or what the public might think of him and that nothing they, or anyone, could say would ever make him change his religion. This associate recalled that in late 1963 or early 1964, in a discussion relative to military service, the registrant said that he did not believe in wars or violence of any type. Registrant again expresed this view to this associate in the spring of 1965. This was the last discussion this associate personally had with the registrant relative to military service. This associate is convinced that the registrant divorced his wife because the Muslims around him insisted that he do so because she did not conform to their way of life. This associate noted that because of the registrant's association with the Muslims he has suffered tremendous losses financially. He does not believe the registrant has contributed heavily financially to the Muslims as a group. This associate stated that originally he thought registrant may have made a claim as a conscientious objector because he just didn't want to serve in the Army. This associate added that he is becoming more convinced every day that the registrant is sincere in his claim and motivated solely on a conviction of conscience that he cannot participate in any matter [232] involving killing. This associate believes that the registrant does not know hate in the manner the Muslims are supposed to hate because the registrant just isn't capable of having any real hate in him. This associate commented, "I'll go to my grave believing registrant basically is a good boy and was brainwashed first by his father and then the Muslims." He explained that he did not mean to infer that the registrant's father was a Muslim but registrant's father had instilled a dislike in the registrant for white people. This associate noted that Elijah Muhammad had told the registrant that the world is going to end in

1966. Registrant sincerely believes this and this associate wonders that if the failure of the world to end in 1966 might not shake registrant's complete faith in Muhammed. Another business associate at Louisville advised that he feels that the registrant is completely sold on the Muslim religion but he also feels the registrant "is stupid and has been brainwashed." This associate stated that he had never seen any aspect of registrant that was not sort of basically gentle. Registrant had never been known to react violently regardless of the amount of provocation outside the boxing ring. He is convinced that the registrant is deeply and utterly sincere about his religion but feels the registrant is "incredibly stupid" about some things "including the motivation of some people hanging around him." He did not think there was anything phoney about registrant's adherence to the Muslim faith. This associate concluded that while he cannot make a categorical statement regarding the sincerity of registrant's conscientous objector claim, it was this associate's "guess the claim is sincere." This associate recalled that in early 1966 the registrant had stated, "You fellows just don't understand my religion. Elijah Muhammud is my leader. They will never let me down. I don't contribute much money to them but I am important to them and they will never let me down. When my fighting days are over, it is my ambition to become a minister for them." This associate also recalled that in January 1966 the registrant [233] had expressed a desire to help the Muslims even at the cost of financial sacrifice to himself.

A business associate of the registrant in New York, who had known the registrant since 1961, advised that he was not aware of registrant's religious background until about 1963 when the registrant indicated that he was a

member of the Muslim religion. He knew the registrant does not smoke, drink alcoholic beverages, or eat certain foods in keeping with his religion. He was also aware that the registrant employs a woman to do his cooking at his various training camps, again in keeping with his religion. This associate considers the registrant a person of basically good character and sincerity who has been honest in his dealings with him. He stated that he had never discussed religious matters with the registrant and did not feel he would be in a position to comment on registrant's sincerity as a conscientious objector. Another business associate in New York advised that he had known the registrant since 1963 and noted that in the fall of 1963 he became aware that the registrant was a Muslim. The registrant had impressed him as being very religious and sincere in his beliefs. He considered the registrant to be a good-living boy. He noted that when the registrant announced his membership in the Muslim religion, his popularity declined and because of this the registrant "lost a fortune" in fees for personal appearances. This associate stated that based upon his knowledge of the registrant and his association with him, he considered the registrant to be sincere in his conscientious-objector claim. Another business associate in New York who has known the registrant since 1962 described the registrant as a very fine person and one who impressed him as being deeply religious. The registrant does not smoke or drink and he follows a strict diet in keeping with the Muslim religion. He noted that although the registrant's personality has changed somewhat since claiming membership in the Muslim religion, he still considers the registrant to be a fine person and a man of good character. He is quite certain that the registrant's claim to being a conscientious objector is made in all sincerity and good faith.

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[234] Another business associate in New York who has known the registrant since the fall of 1965 advised that he was aware of the registrant's membership in the Muslim religion and he described the registrant as a "religious fanatic." He added that he has discussed the matter of conscientious objection with the registrant on many occasions and on each occasion the registrant would only say that it would be against his religion to serve in the Army in a combatant or noncombatant capacity. The registrant also indicated that he would not serve in a hospital if given a conscientious-objector status. He concluded that there is no question in his mind that the registrant's claim of being a conscientious objector has been made in all sincerity and good faith. Another business associate in New York advised that the registrant is a likeable person but one who has been heavily influenced by the members of the Muslim religion and in particular by his own brother.

A business associate in Chicago, Illinois advised that he believes the registrant is quite sincere in seeking objection to military service based upon his religious beliefs because after having pointed out to the registrant the various results which could occur from his seeking conscientious-objector status, the registrant has nevertheless indicated that his beliefs in the religious principles of the Nation of Islam are such that he feels he cannot conscientously participate in the military of the United States. Registrant confines his associates almost exclusively to members of the Nation of Islam.

A business associate of the registrant in Miami Beach, Florida advised that he first met the registrant in Louisville, Kentucky in about 1958. He recalled that the registrant had told him that he has been a Muslim since about 1960. He noted that the registrant appears to follow de-

voutly the rules and regulations of the Muslims. The registrant does not smoke or drink. The registrant's attitude and conduct toward women are excellent [235] and the registrant takes great care not to violate any of the dietary rules of the Muslims. He noted that the registrant's devotion to the Muslims is shown by the fact that the registrant divorced his wife only because she refused to accept the teachings of the Muslims. He noted that whenever an employee of the registrant had been expelled from the Muslim organization, the registrant dropped the expelled employee from his payroll. This associate expressed the opinion that the person who has the greatest influence on the registrant's life is Elijah Muhammad and this associate believes that the registrant would blindly follow any and all orders and instructions given him by Elijah Muhammad. This associate described the registrant as "just a nice guy" who does not hate anyone. He does not feel the registrant dislikes anyone, white or Negro. The registrant could not get angry at anyone. He believes the registrant is a person of fine character. He expressed the opinion that the registrant is sincerely a nonviolent person. He continued by stating that although the registrant's whole life seems to be wrapped up in his Muslim activities, he does not know how often the registrant attends services or meetings of that group. The registrant does not train on Sunday and this associate believes the reason for this is the registrant desires to attend Muslim services. He is of the opinion that the registrant sincerely believes in and conscientiously follows the teachings of Elijah Muhammad.

The registrant's mother and a reference advised that the registrant lived at home with her in Louisville until he turned a professional boxer in about 1960. Since becoming a professional boxer, he has spent most of his

time in Chicago or Miami. At the time the registrant registered with the Selective Service System he made no objection to so registering and said nothing about being opposed to military service. In about 1960 the registrant changed his religion to that of Islam. He became connected [236] with this faith through attending a mosque in Miami, Florida. In 1964, at the time the registrant was ordered to take a physical examination by his draft board, the registrant told his mother that his religion taught him that one could not engage in violence or kill any human being or take part in any war. He told her that he sincerely believed this and that his conscience would not permit him to serve in the Armed Forces of the United States or any other country. Since 1964 the registrant has told his mother that he could not take part in anything related to war, as it would be against his religion and his mother expressed the conviction that the registrant is sincere and honest in his beliefs regarding military service. The registrant's mother noted that although the registrant has not lived continuously at home since becoming a professional boxer, she maintained frequent contact with him. She has no doubt whatsoever that his claim of being conscientiously opposed to participating in any military effort is a sincere one and a deeply seated conviction held by him. She feels that this conviction occurred after the registrant became a member of the Islam faith. She noted that she had raised the registrant in the Baptist faith but after he left home he became interested in the Islam faith. She thought the registrant had been influenced most in accepting the Islam faith by the leader of that faith, Elijah Muhammad. The registrant has always been "a good boy". He has never been involved in violations of the

law except in connection with traffic violations. She stated that she could not recall the registrant ever having engaged in any physical fights with anyone during his youth other than supervised amateur boxing. She believes the registrant is entirely sincere in maintaining his conscientiously opposed to participation in any fashion in support of any war effort. The registrant's father recalled that the first time the registrant ever mentioned anything to him about being conscientiouly opposed to service in the Armed Forces was in February 1964, when the registrant stated that he was a member of the Islam [237] faith and that his religion teaches that persons cannot take part in any war or commit an act of violence against another person. He stated that he was convinced that the registrant was sincere when he expressed these sentiments. The registrant has repeatedly stated the same thing that his religion will not permit him to do anything which will help in any war or anything which involved violence. The registrant's father stated that religion means everything to the registrant. He talks of his religion all the time and is very proud of his religion. He knew that the registrant had turned down a number of opportunities to make money because there was something about the opportunities which disagreed with the registrant's religious teachings. The registrant's father noted that his son has been a fine boy and has caused the family no trouble. The registrant's father advised that he himself is a Methodist but the registrant was raised as a Baptist by his mother. The registrant became interested in the Islam faith after he left home as a professional boxer. He felt the registrant first became acquainted with the Islam faith in Miami. He stated that there is no doubt in his mind that the registrant is entirely sincere in his beliefs in the Islam faith. He con-

cluded that there is absolutely no doubt in his mind that the registrant is conscientously opposed to participating in any manner in any war effort. A neighbor of the registrant and his family in Louisville, Kentucky for several years after 1953 advised that she considers the family to be a good family. The registrant's mother attended church regularly and when the registrant and his brother were youths, she took them to church with her. Their attendance at church with their mother became infrequent when they became older. This neighbor considers the registrant and his brother to have been very mannerly boys who caused no difficulty at all and were not the type to run around a lot or to get into difficulty. The registrant's whole life during his early years seemed to be in boxing. The registrant showed an extreme fondness toward younger children as [238] a youth. She noted that after the registrant became nationally famous, he would return to the neighborhood for a visit and he continued to exhibit a pleasant, friendly personality. This neighbor considers the registrant to be an honest, reliable and sincere individual. Another neighbor of the registrant and his family in Louisville characterized the registrant's mother as a wonderful person. The registrant's father was a good father, but inclined to "drink a little too much." The registrant and his brother were good boys, always polite and helpful. Neither of them had been known to be in any trouble. She felt the registrant and his brother had "old time manners" in which both would always address their elders with respect. She recalled that the registrant was interested in poetry during his high school days. This neighbor considers the registrant honest, sincere and a reliable individual. A friend of the registrant since elementary school days in Louisville advised that he knows the registrant is a member of the Muslim faith

and is sincere and faithful to his religion. He recalled that even when the registrant was in high school, he used to speak of this religion. He knew that the registrant has always been opposed to violence and he stated that if the registrant states he is conscientiously opposed to military service, he is confident that such a statement is sincere and honest. The registrant has always been a likeable and easy-going person, good-hearted, and a person who was never rowdy or who was "out looking for a fight". A friend of the registrant for ten years in Louisville advised that the registrant has always led a good, clean life. He has never known the registrant to drink intoxicating beverages, engage in any immoral activity or show any signs of bad character. He stated that he has never discussed the registrant's religious beliefs extensively but he believes the registrant is sincere in such beliefs. He characterized the registrant as a likeable fellow and noted that everyone around him liked him. He felt the registrant became interested in [239] the Muslim religion after turning professional in boxing and starting to live in Miami. He has never known the registrant to act in any violent way outside the boxing ring. He recalled that recently the registrant stated that he just "can't go into military service—I don't know what they're going to do to me." The registrant stated that he just could not do anything having to do with killing his brothers. This friend thought the registrant divorced his wife because she would not dress right and she set a bad example for the other Muslim women. This associate believes the registrant's claim to conscientous-objector status is sincere. A relative of the registrant in Louisville advised that he has known the registrant all of his life and recalled that as a youth he was a fine boy. This relative thought that in 1959 or 1960 "someone in Chicago" influenced the

registrant and his brother with the Muslim religion. The registrant last visited this relative's home in 1960 when this relative expressed disagreement with the principles of the Muslim religion. He felt that the registrant had become a member of the Muslim religion in about 1964. This relative feels that if the registrant claims conscientious objection from military service, "he is sincere but foolish". He characterized the registrant as weak-minded and he thought the registrant was being led completely by persons with whom he should not be associating. Another neighbor in Louisville characterized the registrant and his brother as fine boys. Their mother was a devout Baptist and the boys used to attend church with her. The registrant and his brother were good boys and never caused any trouble. The registrant began evidencing interest in the Islam religion around 1960. She believes the registrant is sincere in his claim, although she completely disagrees with his claim as a conscientious objector.

A representative of 50th on the Lake Motel, Chicago, Illinois advised that the registrant maintains a residence [240] at this motel on a transient basis only. He noted that the registrant was very closed-mouthed while at the motel and always conducted himself with scrupulous decorum. A neighbor of the registrant and his wife in Chicago for a year prior to January 1965 advised that the registrant, his wife and two other male individuals, identity not known, resided in an apartment. The registrant caused no trouble of any nature and did not associate with other tenants.

A neighbor of the registrant in Miami, Florida advised that he developed a close personal acquaintance with the registrant and recalled that he had done all he could to discourage the registrant from becoming a member of the Nation of Islam. He stated that prior to the time the

registrant publically announced his Nation of Islam membership, the registrant had no religion whatsoever and appeared to be searching for a religion. This neighbor had the impression that the registrant was seriously considering becoming a Christian. The registrant has become a devout and obedient follower of Elijah Muhammad and a sincere believer in the Islamic religion. He stated that he believes the registrant's whole life is influenced and directed by Elijah Muhammad. He noted that the registrant appears basically to abide by the rules and regulations of the Muslims. He believes the registrant regularly attends Nation of Islam meetings. The registrant appears to be a relatively peaceful person and he has never shown any hatred toward anyone. The registrant seems to welcome all people into his home regardless of race. This neighbor felt the registrant would not hesitate to fight back if anyone ever attacked him. The registrant has stated that he never wants to hurt anyone in the boxing ring. The registrant has stated that he could not serve in the military because he does not want to kill anyone. The registrant stated that he did not want to serve as a noncombatant, as this would indicate he was supporting the killing of people. This [241] neighbor recalled that about a year ago the registrant's father arrived at the registrant's home, obviously intoxicated. He had a knife in his hand and started shouting about the registrant's membership in the Muslims and the fact that registrant's father's name was being ruined by the Muslims. He stated that he was going to kill all the Muslims around the registrant's house. This neighbor noted that the registrant got extremely upset at his father's statements and actions, and he attempted to attack his father and had to be physically restrained from hurting him. When still being held, the registrant

was attempting to kick his father. This neighbor feels that the registrant is basically a "stupid person" although he does have some native intelligence. He feels that the registrant's stupidity together with a quirk or flaw in his character, apparently developed through childhood environment, has made it possible for him to accept the teachings of Elijah Muhammad. Another neighbor in Miami advised that the registrant appears to be a person of good character and reputation, and is well-liked by people in the neighborhood. She knew nothing regarding the registrant's home life which would reflect adversely upon his character. Another neighbor advised that the registrant's general behavior appears to be very good.

The registrant's former wife advised that she was married to the registrant for eleven months and resided with him in Louisville, Miami and Chicago until August 1965. She knew him for one month prior to their marriage. She knew that he was a member of the Nation of Islam when she met him and during their period of marriage she attended the Nation of Islam Mosque, primarily in Chicago on a relatively weekly basis, on Sundays. She is of the opinion that the registrant is sincere in his acceptance of the teachings of the Nation of Islam, as made known to him through Elijah Muhammad, whom she thinks is the registrant's only spiritual advisor. She believes that the registrant blindly follows the teachings and precepts [242] of the Nation of Islam, in that the registrant does not smoke, drink or eat foods forbidden by the teachings of Muhammad. She expressed the opinion that she would still be married to the registrant if it were not for the influence exerted on his thoughts and actions by Elijah Muhammad and other members of the Nation of Islam. She recalled that she had attempted to comply with the

instructions of the Nation of Islam regarding her dress, but since it was not in her heart to have hate for any person she was not acceptable to the Muslims and she expressed the opinion that the registrant was directed by influential active members of the Nation of Islam to disassociate himself from her, which he did. She noted that the Nation of Islam in Chicago had provided her attorneys with a check which bore the notation, "Return of charitable contributions" in connection with her divorce settlement with the registrant. She stated that the registrant is controlled in his boxing career by the Nation of Islam through a firm owned and operated by the Nation of Islam. She noted that neither the registrant's mother nor father is a member of the Nation of Islam and are not in sympathy in any way with the tenets of this movement. The registrant's former wife stated that she believes the registrant is sincere in his convictions with the qualification in her mind regarding his participation in a "savage sport" which to her is in opposition to the expressed teachings of the Muslims. She stated that the registrant is sincere in his conscientious objection to military service based upon his adherence to the teachings of the Nation of Islam, in that she believes he has been advised by Elijah Muhammad and other leaders of the Nation of Islam that such service is against the teachings of the Nation of Islam. She noted that she still would be married to the registrant if it were not for her failure to be accepted by the leaders of the Nation of Islam as the wife of the registrant. A friend of the registrant since 1957 noted that he believes the registrant is a strong believer in the Nation of Islam, adding "it's all he ever talks about". He recalled that on June 6, 1966 the [243] registrant stated that he would not have to go into

military service because of his religion but added that "if he had to go, he would go." This friend stated that the registrant is a person of fine qualities who has no hate for anybody, but as a member of the Nation of Islam he must act in a way to comply with the teachings and desires of the leaders of this movement. This friend thinks the registrant is sincere in his convictions as a conscientious objector to military service, in that it is in conflict with the teachings of the Nation of Islam, but he added that this sincerity on the part of the registrant is predicated in the fact that he is under the complete control of Elijah Mumammad and other dedicated leaders of the Muslims. He felt the registrant would perform any act directed by Elijah Mumammad. A friend of the registrant who has known him since March 1962 advised that when he first met the registrant, the registrant acknowledged that he was a follower of Elijah Muhammad and a member of the Nation of Islam. The registrant did not make this fact publically known until after he had won the World Heavyweight Boxing Title. The registrant always attended Muslim meetings whenever he could and he was known to this friend as a dedicated Muslim who talked Muslim day in and day out, and he was a person who really believed in it. He stated that money does not mean as much to the registrant as his religion. The registrant has stated that he does not believe in war or fighting, aside from boxing as a sport, and he is opposed to service in the Armed Forces. The registrant will not serve in the military forces. This friend stated that he has never been a member of the Muslims himself, although he has attended numerous Muslim meetings with the registrant. He noted that the registrant first met the woman who became his wife on July 3, 1964. He noted that she was never

a Muslim, either prior to or after marriage to the registrant. He noted that the registrant always wanted his wife to join the Muslims, as this was his way of life. This friend stated that this was not the [244] sole reason for their divorce but it was a factor in the decision. This friend concluded that he knew of nothing that would reflect upon the character or reputation of the registrant, and he expressed the opinion that the registrant is sincere in his claim of conscientious objection to military service based upon his Muslim religion.

The spiritual leader of the Nation of Islam, and a reference, advised that he considers himself to be the spiritual advisor of the registrant. He has discussed the matter of conscientious objection with the registrant and believes that he is sincere in his objection to any form of military service. He stated that he did not advise or instruct the registrant to claim conscientious objection, but he explained to him the teachings of the Nation of Islam. He advised the registrant that these teachings preclude any member of the Nation of Islam from participating in any form of the military service of the United States. He believes the registrant is sincere, that he is a very good young man, and that the registrant's whole heart and mind are involved in the principles of the Nation of Islam. He considers the registrant genuinely sincere, in that he is in regular attendance at mosque meetings. He noted that the registrant gives whatever he is able to give and does contribute commensurate to his financial status. This advisor stated that he considers boxing a sport of skill and not in conflict with the teachings of the Nation of Islam. The registrant has expressed his desire to devote his full time and talents to the furtherance of the Nation of Islam movement by recruiting new members after his retirement from

boxing. This advisor reiterated that he believes the registrant is sincere in his conscientious objection because the registrant is an active, sincere and dedicated member of the Nation of Islam who has been advised that no member of the Nation of Islam may bear arms against anyone; because the registrant is regular in his attendance at the mosque and he complies with all of the teachings of the [245] Nation of Islam; because he makes financial contributions commensurate with his income; because he desires to leave the sport of boxing and completely dedicate his activities of the furtherance of the Nation of Islam; because "his whole heart and mind is involved" in the movement; and that he relies completely on Elijah Muhammad for spiritual counseling. Another coreligionist who has known the registrant for two or three years advised that he understands the registrant has been a believer in the precepts of the Nation of Islam since 1960. He stated that the registrant abides by all of the precepts of the Nation of Islam, in that he does not smoke or drink and he abstains from eating "swine". He noted that the Nation of Islam religion prohibits service in the military of the United States in any capacity and he stated that as far as he knows, the members of the Nation of Islam have never entered military service voluntarily. This coreligionist believes the registrant is sincere in requesting conscientious-objector status based upon his membership in and affiliation with the Nation of Islam. He noted that any male who enters the Nation of Islam is automatically a member of the Fruit of Islam. He added that the registrant holds no rank or title within the Nation of Islam. Another coreligionist in Chicago characterized the registrant as a good Muslim and one who is sincere in his convictions regarding conscientious-objector status, in that he is a true

and loyal Muslim and as such he could not in good conscience violate the tenets of this teaching by engaging in military service. A coreligionist in Miami, Florida advised that he first met the registrant five or six years ago when the registrant visited Mosque No. 2 in Chicago, Illinois and stated that he had heard of the teachings of Elijah Muhammad and was interested in seeing the operation of that mosque. This coreligionist stated that he believes the registrant has been a believer in the Islamic religion from that time. He noted that when in Miami, the registrant attends Muslim meetings at least twice a week. He knows that the registrant [246] is a completely devout follower of the Islamic religion as taught and directed by Elijah Muhammad. He stated that there was absolutely no question in his mind as to the sincerity of the registrant and his beliefs in Elijah Muhammad and his beliefs in the Islamic religion. He noted that Muslims do not forbid or frown on participation in sports by its members. They look on boxing as a sport; therefore, a member may become a professional boxer without violating any of the rules and regulations of that organization. He concluded that there is absolutely no doubt in his mind that the registrant is a true, devout, sincere believer in the Islamic religion and in the leadership of Elijah Muhammad. The registrant is therefore a peaceful person and could not in good conscience answer a call to the military service of the United States. Another coreligionist in Miami who has known the registrant since 1960 expressed the opinion that the registrant is a true, sincere and devout believer in the Islamic religion and in the teachings of Elijah Muhammad. The registrant's sincerity is exemplified in his behavior and conduct in his everyday life. The registrant does not drink or smoke, and he completely adheres to the dietary laws of

the Muslims. He recalled that when he saw a press report that the registrant had purchased a gun, he went to the registrant and the registrant explained that he purchased it more or less as a toy. This coreligionist stated that he immediately took the gun from the registrant and threw it in the Atlantic Ocean. He noted that the registrant's participation in the sport of boxing is not in any way contrary to the rules of the Nation of Islam and the teachings of Elijah Muhammad. Other coreligionists in the Miami, Florida area attested to the registrant's devotion to the principles of the Nation of Islam and his following these principles.

An informant in Chicago, Illinois, advised that Elijah Muhammad is the national leader of the Nation of Islam and that his Temple of Islam No. 2 in Chicago is [247] the national headquarters. The Nation of Islam was characterized as an all-Negro organization which was originally organized in 1930 in Detroit. Members believe that the so-called Negroes are slaves of the white race, referred to as "white devils" in the United States. In the past officials and members of the Nation of Islam, including Muhammad, have refused to register under the provisions of the Selective Service Act and have declared that members owe no allegiance to the United States. The Fruit of Islam was characterized as a group within the Nation of Islam composed of male members of the Nation of Islam. The purpose of the Fruit of Islam is to protect officials and property of the Nation of Islam, assure compliance of members with the Nation of Islam teachings and to prepare for the War of Armageddon. Members of the Fruit of Islam are required to participate in military drill and are afforded the opportunity to engage in judo training. The Fruit of Islam is governed by military system, wherein the members are

controlled by general orders similar to those issued by regular military organizations.

Another informant advised that the registrant attended a meeting of Muhammad's Mosque No. 12 in Philadelphia in 1964 and attended other meetings in 1965. The registrant was reported to have addressed a meeting of the Nation of Islam at Temple No. 6 in Baltimore on May 6, 1964, wherein he discussed his recent fight and how, by becoming a member of the Nation of Islam, he was helped to become the Heavyweight Champion of the World. He also stated that by becoming a member of the Nation of Islam, he had learned things about himself that no white man had ever told or taught him. He said that every black person should become a Muslim. He noted that the black man should stop trying to become like the white man. The registrant added that he never knew how lucky he was until he had heard about Mr. Muhammad and began following his teachings. The registrant concluded by stating that if he were [248] penniless, he would not want to have anything other than to be a Muslim and a follower of Mr. Muhammad. At a dinner meeting held by Temple No. 6 in Baltimore on December 20, 1965, the registrant praised a number of influential Negroes attending the meeting on the abuse of the "white devils" to the so-called Negroes. The registrant stated that the Negro would never have equal rights under the present system as controlled by the white man. A minister of Muhammad's Temple of Islam No. 27 in Los Angeles advised that he has known the registrant since 1962. He stated that he has had numerous conversations with the registrant and had counseled him in the Muslim religion. He has found the registrant a dedicated member who practices the teachings of Elijah Muhammad and as such is completely sincere in his claim of conscientious objection

to military service. He stated that war, killing and violence are wrong and in direct contradiction to these teachings, even to the extent of the use of part of these elements in sports. He stated that Muhammad does not agree with the registrant's participation in boxing matches, but as long as the registrant does not violate the basic concepts of the religion Muhammad will not interfere in the registrant's personal pursuits. This coreligionist stated that there has never been any question concerning the character or reputation of the registrant. He added that he had met the registrant's former wife on one occasion and to his knowledge she never joined the Muslim religion, although it was his understanding that she did attend a number of meetings and had considered possibly becoming a member.

A representative of the Chicago, Illinois, Police Department advised that the registrant was arrested for disorderly conduct on December 14, 1963. He was found guilty on February 11, 1966 and was fined $45 plus $5 costs. A representative of the Department of Public Safety, State of Kentucky, Frankfort, Kentucky, advised that on [249] February 8, 1963 the registrant's operator's license was suspended by the department as the result of the fact he had accumulated a total of 13 points, representing infractions of motor vehicle regulations in Indiana, Florida and Georgia. On June 20, 1963 the Department of Public Safety again suspended the registrant's license for a period of six months in view of various violations of the State of Florida. The registrant never submitted to a test for a new operator's license in the State of Kentucky and does not hold a current Kentucky operator's license. Records of the Jefferson County, Kentucky Quarterly Court in Louisville reflect that the registrant's driver's license suspension of February 8, 1963 had been set aside. Records of the

Miami, Florida, Police Department reflect that on September 19, 1964 the registrant purchased a .22 caliber Colt derringer from a pawn shop in Miami. Credit records are satisfactory.

Records of the Dade County Circuit Court Clerk's Office, Miami, Florida, in File 65C-6909 reflect that in the registrant's complaint for annulment of marriage and other relief he alleged that he entered into a common law marriage at Miami, Florida on or about July 24, 1964 and subsequently on August 14, 1964 was married in a civil ceremony in Gary, Lake County, Indiana. The registrant further alleged that his wife falsely and fraudulently represented and promised that following the marriage she would adopt the Islamic faith as her own religious order. The registrant further alleged that his wife refused to convert to the Islamic faith. Court records reflect that a final decree of divorce was issued on January 10, 1966. The registrant was directed to pay alimony and his wife's attorney's fees. Subsequently, a petition for rule to show cause was filed on February 17, 1966 because of the registrant's failure to pay all of the money to his wife and her attorney's fees as decreed by the court. Subsequently, an order discharging the rule was entered.

[250] A representative of the XVI U. S. Army Corps, Omaha, Nebraska advised that the registrant made no effort to join the Army Reserve in the State of Nebraska. A representative of the Army National Guard, State of Nebraska at Lincoln advised that the registrant never made any attempt to join the Nebraska National Guard.

The following materials are based upon press accounts. The *Amsterdam News*, New York, on March 28, 1964 quoted the registrant: "I was rejected by the U. S. Army but I was ready to go. I was ready to do what the Army re-

quested." The *Chicago American* on February 24, 1966 reported that the decision that the registrant would become a conscientious objector was made by the Black Muslims. The orders had been sent to the registrant in his training camp in Florida. The *Los Angeles Sentinel* on August 13, 1964 quoted the registrant's wife as stating that she was a Muslim and that her leader is the Honorable Elijah Muhammad. The *Miami Herald* for January 8, 1966 quoted the registrant's wife as stating that the registrant had slapped her, but she still loved him. The *Courier Journal,* Louisville, Kentucky on March 24, 1963 reported that the registrant expects to be called up in 1964 for Armed Forces duty and his inclination now is to serve two years and get it over with rather than serve six months and attend reserve meetings once a week for some years. The *Chicago Sun Times* for July 3, 1963 quoted the registrant as saying that the Black Muslim organization is the greatest one that he has found, but he added that he did not know whether he was a member of the organization. The *New York Herald Tribune* on January 23, 1964 reported that when the registrant was 18 years of age, while visiting in New York, he first heard a speech by a Black Muslim and his interest in the organization was revived two years ago when he started attending Muslim meetings in Miami. The *Miami Herald* for February 7, 1964 reported that the registrant's father stated that the registrant joined the Black Muslims four years ago at the age of 18. He stated that the Muslims had [251] told the registrant and his brother to hate white people, to hate women and to hate their mother. The *New York Journal American* on February 27, 1964 quoted the registrant in connection with some recent Muslim meetings: "I've just spent four hours with God. He's going to fix it up so I won't have to serve in the Army." The *Chicago American* for

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February 28, 1964 reported that the registrant revealed that he had been a Black Muslim since 1959, when he was 17 years of age. The March 8, 1964 issue of the *Courier Journal,* Louisville, Kentucky reported the registrant as stating: "I don't hate anybody, and I know the Muslims don't teach hate. If they did I wouldn't be with them." The March 14, 1964 issue of the *Chicago Sun Times* reported the registrant as stating with respect to the possibility that he might be inducted into the Army: "No one likes the idea of dropping from $1,000,000 to $85." The *New York Times* on March 24, 1964 reported that the registrant was first introduced to Islam when he was 17 years old in Atlanta. In the intervening years he sought other faiths and other answers but eventually found, he said, that the Muslim philosophy "fits us (Negroes) like a glove." The August 15, 1964 issue of the *Courier Journal,* Louisville, Kentucky quoted the registrant's mother as stating that the Black Muslims have brainwashed the registrant and had ruined her two boys. She noted that the registrant and his brother did anything the Muslims tell them to do. The May 22, 1965 issue of the *Chicago Daily News* quoted the registrant as stating that as long as Elijah Muhammad lets him fight, he will continue to fight but if Muhammad tells him to quit, he would quit. The article also quoted the registrant, "Religion is more important to me than fighting. If all American Negroes are not Muslims within two years, I will get out of the Muslims." The February 18, 1966 issue of the *Chicago Daily News* quoted the registrant that he would seek to avoid military service because of his religious beliefs and he stated, "I am a member of the Muslims and we don't go to no war unless they are declared by Ali himself. I don't have [252] no personal quarrel with those Vietcongs." The registrant was also quoted as saying that he had not spoken to Elijah

Muhammad about making his appeal of his I-A classification. The registrant was further quoted as saying: "Let me tell you, we Muslims are taught to defend ourselves when we are attacked. Those Vietcong are not attacking me. These Vietcong are fighting a very nasty war over there. There is a lot of people getting killed. Why should we Muslims get involved? Besides, I am fighting for the government every day. I am laying my life on the line for the government. Nine out of ten soldiers would not want to be in my place in the ring. It is too dangerous." The February 19, 1966 issue of the *Courier Journal*, Louisville, Kentucky reported that the registrant had stated that he would ask his draft board to reclassify him as a conscientious objector: "I am going to appeal this. The theory of God, Ali, I have won't let me go. In Islam we don't believe in killing off other human beings. I can't go." The article also reported that many Muslims have served in the Army. The February 19, 1966 issue of the *Louisville Times* reported that Page 135 of the book, "The Eternal Message of Muhammad", states the following:

> "The Message of Muhammad considers warfare admissible and a virtue when undertaken to repel aggression against the weak, be it against an individual or a group, in the interest of erecting the edifice of justice desired by God on earth. The prophet devoted himself to the repulsion of tyranny, as did his successors, inasmuch as he commanded the authority of the Islamic policy to defeat aggressors and avert tyranny. . . It follows therefore, that an Islamic state may ally itself with one or more states to defend a victim."

[253] The April 8, 1966 issue of the *Chicago American* reported that the registrant had tried to join the Army

Reserves in Nebraska but had been turned down. An article by the registrant in the April 15, 1966 issue of "Muhammad Speaks" stated that the registrant had neglected to rely on the One Divine Foundation that had previously carried him successfully through his major fights; that he was relying on his own natural ability to beat Chuvalo, whereas he should have placed his faith, prayers and reliance upon Ali and Elijah Muhammad. The registrant noted that what had happened to him is a prime example of what can befall anyone who forgets to place Ali and his messenger in front of their endeavors rather than behind them. The May 1, 1966 issue of the *Courier Journal*, Louisville, Kentucky reported that the registrant stated that the fights he has in the ring cannot compare with the pressures to which he is subjected out of the ring and that "if it wasn't for my religion I would be dead or crazy." The May 20, 1966 issue of the *Chicago Sun Times* reported that the registrant had gone out of his way publicly to thank President Johnson and his local draft board for allowing him to go to England to fight. The registrant was quoted as saying, "I want to make mention of something that is very close to me. I refer to the country in which I was born—the United States of America. I would like to say that I was born there and that is where I am going to return." The May 20, 1966 issue of the *Miami News* reported that the registrant, when asked his choice among recruitment in the Army, work in an Army institution as a conscientious objector or going to jail, replied, "Let them put me in jail. How big would that make me? Damn the fights, forget the money. Let them put me in jail." The May 22, 1966 issue of the *Courier Journal*, Louisville, Kentucky reported that the registrant in commenting on the fight with Cooper on May 21, 1966 that had been stopped because of a bad cut over Cooper's

eye stated: "I didn't want it to end like that. I don't like doing this to anybody. It is against my religion. It is [254] against my feelings. I don't mind admitting I was a bit disturbed by all that blood. I didn't really want the violence to continue. I don't like hurting anyone." The "Three Star Final Edition" of the *Chicago American* at page 23, column one, reported that the registrant told close friends he would like to visit wounded Vietnam service men in the Great Lakes Naval Hospital. On July 5, 1966 officials of the Great Lakes Naval Hospital, Great Lakes Naval Training Center, Illinois advised that neither the registrant nor anyone reportedly representing him had indicated the registrant would like to visit wounded Vietnam service men.

Prepared: July 9, 1966

Exhibit A-2

Cassius M. Clay, Jr.—Conscientious Objector

Hearing August 23, 1966

Muhammad Ali a/k/a
Cassius M. Clay, Jr.
4610 N.W. 15th Court
Miami, Florida
August 15, 1966

The Selective Service System
Kentucky Appeal Board
and to the
Department of Justice
Washington, D.C.

Re: Local Board Registrant
Cassius M. Clay, Jr.
No. 15-47-42-127
a/k/a Muhammad Ali

Dear Sirs:

You will notice above that I show my legal domicile as 4610 N.W. 15th Court, Miami, Florida. I spend most of my time, however, in Chicago and maintain a place of resident there so I can be close to the headquarters of The Lost Found Nation of Islam, the religious group that I work with, and I use my parents' address in Louisville to receive my mail from my local board of the Selective Service System.

I am writing this letter, which I am handing to Judge Grauman, to show you that I have genuine and sincere conscientious objections to military service because of my life, my work and my devotion to the religion known as

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The Lost Found Nation of Islam which I first became acquainted with through the teachings of Elijah Muhammad during the month of October 1961. It was this way: I was walking down N.W. Second Avenue and Tenth Street in Miami, Florida when one of the followers of Elijah Muhammad approached me and invited me to come and hear one of the spiritual services that was then being held at Muhammad's Mosque No. 29 in Miami which was then located at N.W. Second Avenue between 7th and 8th Streets N.W. I went there and liked what I heard and believed what I heard and I immediately decided that I wanted to become a part of it and learn more about the Islamic faith.

After the meeting was over I was introduced to Captain Samuel X. Saxon, who was captain of Muhammad's Temple No. 29. I told him of my interest and desire to learn more about it. He invited me to come to all of the meetings which were held three times a week. There was one meeting on Wednesday night at 8:00 P.M., and another meeting on Friday night at 8:00 P.M., and another meeting on Sunday afternoon at 2:00 P.M. I agreed to attend and did thereafter regularly attended all of the meetings for three months accompanied by him and being convinced and fully understanding the purposes and program of the faith thereafter I attended on my own. I subscribed to the weekly publication, Muhammad Speaks, which I read and studied. This was the start of my training in the ministry. I also distributed the publication, Muhammad Speaks, on the streets of Miami three days per week.

During the first three months of my indoctrination the thing that kept me close to it was a phonograph record which I replayed and listened to many times daily until I learned it by heart. The record was entitled "A White Man's Heaven Is A Black Man's Hell" being a speech and

song which which was by one of Muhammad's Ministers, Louis X of Boston, Massachusetts. The message on the record was drilled deep into my memory so I could remember it all word for word. Part of the message was: "Why are we called Negroes? Why are we deaf, dumb and blind? Why is everybody making progress and yet we lag so far behind? Why are we mistreated? Why are we in this condition, stripped of our names, our language, our culture, our God and our religion? Here in America all of our religious training is gotten from the preacher. He has told us of a heaven way up in the sky that we can't enjoy now but rather after we die. So my friends, take it for what it is worth, your heaven and your hell is right here on this earth." There was a great deal more to the record that I played several times each day. It deeply drilled into my mind and memory time and time again each day that the Religion of Islam, as taught by Elijah Muhammad, was the thing that I had been looking for all my life and now I had found it. I was determined to learn all about it and teach and preach it to others. I was also determined at that time to make it my main purpose in life because it had the only answer to the Black Man's needs and the answer to all of the questions that I had in my mind about the so-called Negro all of my life. I was also determined to make everything else in my life secondary and incidental to this my main purpose in life; preach and teach the Religion of Islam as taught by Elijah Muhammad.

I, as above stated, in the beginning of my training was a regular subscriber to the paper Muhammad Speaks and had in my possession and regularly studied many other publications containing the doctrines and principles of the religion as taught by Elijah Muhammad, beginning in 1961. I also attended the weekly meetings without failure at

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Miami and all the other places where there were temples and mosques in the United States during my journeys from place to place as a boxer. I attended and received religious instructions in preparation for my ministry in the temples and mosques at Miami, in Atlanta, Georgia, Detroit, Michigan, Cincinnati, Ohio, Newark, New Jersey, Philadelphia, Pennsylvania, New York City, Boston, Massachusetts, Los Angeles, California and later beginning in 1964 regularly at the home of Elijah Muhammad in Chicago where I visited and received instructions regularly; and I also received direct counsel from Elijah Muhammad by telephone regularly between visits.

When I was born I received the slave name of Cassius Marcellus Clay, Jr., and used this name thereafter as well as at the time I registered for the draft and filed my original papers with the draft board. From early childhood I was a member of the Baptist faith but was always looking for the religion that practiced what it preached and taught peace for man instead of war and finally I found it in the Religion of Islam.

As a part of that religion I was taught that the black man through slavery had lost and had been robbed of their true names that their ancestors had and were named after their slave masters, being the names of white men. When I was officially registered as a believer and follower of the Muslim Faith in the early part of the month of February, 1964 I received the obligation as a part of my religion to use the letter "X" instead of the last name Clay which letter "X" meant that I was in search for my own name. The use of "X" by Muslims signified that we were "ex" Christians, "ex" Negroes and no longer believers and followers of the Christian way of life but instead had assumed the way of

Exhibit A-2

life of striving to be a righteous Muslim follower of Elijah Muhammad.

I continued thereafter, as part of my religious belief and practice, to use the letter "X" in my name until my spiritual leader the Honorable Elijah Muhammad on his national radio program publicly and to the whole world gave me two holy names of Muhammad Ali which are two attributes of Allah himself, and over the radio program he said he hoped that I accepted the name. I did with joy and honor and have tried to live up to the name and defend it ever since by preaching, practicing and living the life of a Muslim twenty-four hours a day.

I have defended my religion and faith on every occasion where I was challenged, tested or debated with. This has been both privately and publicly. I have been constantly challenged because of my religion since I announced to the world on February 26, 1964 that I was a Muslim. This was after my fight with Sonny Liston. For example some of the outstanding instances are (1) The Les Crane Television show where I appeared on three occasions; (2) The Mike Douglas Television show where I appeared on two occasions; (3) The three occasions on the Howard Cossell Sport Radio show originating in New York; (4) The three occasions on the Chicago television show called the Irv Cupsonet show; (5) and several other television and radio shows in different cities around the country. On each and every one of these occasions I was challenged because of my Muslim religion and defended it by explaining and telling about my practicing what I preached as a Muslim.

I have defended my faith on the streets, in restaurants, at airports, on airplanes because I was challenged everywhere and attacked and questioned because of my being a Muslim. This has made me use my knowledge and under-

standing of my religion as a minister and defend it as such.

Not only have I defended and practiced my religion by word of mouth but, I have also in all of my conduct and private life attempted to let my action speak louder than my words. My personal and private conduct, as I will now show, has been a silent testimony of the sincerity of my personal statements of my beliefs.

I divorced my wife at a cost to me of $170,000.00 because of her failure and refusal to faithfully live up to the Muslim religion as she promised to me. This made me grow stronger in the faith. Contracts involving large sums of money offered to be paid to me for sponsoring products for sale were turned down by me because it was not consistent with my religion to endorse such products. I refused an extraordinarily valuable movie contract to do the leading role in "Slave Mutiny" and also another role that was offered to me in the movies to do "The Jack Johnson Story", a movie based on the life story of the fighter Jack Johnson as well as to participate in many many T.V. spots and rolls in numerous other movies. I turned them down because the rolls involved conduct inconsistent with and contrary to my religious beliefs. I refused to perform a Columbia Record Recording Contract for the recording of my voice as a singer that would have netted me over $500,000.00. I turned this down too because the words and ideas I was asked to sing were contrary to my religious beliefs and inconsistent with my position as a minister and figure as a leader in the Muslim religion. It would not set a proper example by me as a minister in my religion.

Last but not least to mention is the stand that I took publicly as a conscientious objector to the war in Viet Nam. The Illinois Boxing Commission challenged me and ruled that it would permit me to participate in the Ernie Terrell

fight to defend my World Championship Title, which would have brought me $2,000,000 only if I would apologize and retract the words that I stated publicly describing my conscientious scruples against participation in the war in Viet Nam. I could not conscientiously and consistently with my religious convictions retract my words or apologize for what I said. I thereby refused to exercise the option given me on those terms to fight and earn the $2,000,000. This conscientious and uncompromising position showed the sincerity of my position as a conscientious objector and as a member of the Muslim Faith.

The most important thing that proves the sincerity of my beliefs in the Muslim religion is the fact that I have since early 1964 devoted over 90 per cent of my time to preaching and teaching as a minister the doctrine and principles of the Muslim faith. This shows that preaching is my main business and vocation in life and that everything else is entirely secondary and incidental to my ministry. I have devoted an average of more than 40 hours per week of each year of my life since 1964 to the performance of my ministerial duties as an ambassador of the Muslim faith. I will continue to do so and am striving for the day when every minute of my life will be devoted to such ministry and not even any incidental part-time will be devoted to anything else. Then my entire life will be confined to my religion instead of, as now, making it my vocation or main purpose in life with boxing an incidental pursuit.

It is true that I must devote and do devote some of my time to training and preparing for boxing matches to defend my World Heavyweight Championship Title from time to time. Each training period for such events lasts only 30 days with only 3 hours each day or 90 hours taken

each month for preparation and training. This leaves the rest of my time during this one month training period to devotion to and the performance of my ministerial duties. The number of times that I fight or have to fight each year in defense of my title is never enough for my training for bouts to take out of each year of my life an amount of time that keeps the ministry from being my main job or vocation in life. I still am able at the end of the year to show that I devote on the average of over 40 hours per week for 52 weeks per year to the performance of my ministerial duties.

The things of my ministry that take up over 90 per cent of my time (over 40 hours per week for 52 weeks per year) in the performance of my duties as minister of religion I list as follows:

(1) I am at the office of Muhammad Speaks in Chicago regularly writing for the religious paper Muhammad Speaks, the voice of my religion; and I also answer questions while I am there on my religion and my beliefs and encourage others to embrance my said religion.

(2) I answer a large amount of fan mail inquiring about my religion and try to convert such persons to my faith by such letters.

(3) I also, while at the office of Muhammad Speaks, answer questions as a minister by persons outside our faith.

(4) Spend time with Elijah Muhammad receiving instructions and making notes of his orders to me as to how to more effectively and efficiently carry out my ministerial duties.

(5) Spend time each day or evening before retiring studying the book by the Honorable Elijah Muhammad en-

titled "Message to the Black Man", the weekly periodical or paper entitled "Muhammad Speaks" and the Holy Quoran which enables me to more effectively and efficiently preach as a minister of religion.

(6) Time regularly spent each week on four meeting nights fishing for men to be saved by attracting crowds of people around me through street preaching and then invite them to come to and lead them to the meetings to hear a sermon on the beliefs and the religion of The Lost Found Nation of Islam. It is considered good if one gets as many as two people to come to a Muslim mosque from off the streets but I never bring less than five persons. On exceptional occasions in New York City, Detroit and Philadelphia as many as 320 persons have been brought by me. In Miami I average thirty people fished by street preaching; and in Chicago in thirty minutes I brought in twenty-seven new listeners to the meeting.

(7) Time doing call-back fishing work on days before and between meetings by personal visits and telephone calls to people at their homes and places of business fixing time and place to pick them up and bring them to the meetings.

(8) Time traveling from mosque to mosque and temple of The Lost Found Nation of Islam as a special representative traveling minister (in answer to calls by ministers of different mosques and temples throughout the United States) to visit them, draw large crowds by my fame and name as World Boxing Champion thus capitalizing on it for my religion as a minister to the limit. I use the World Heavyweight Championship title to increase attendance at various mosques and temples where I preach to them the doctrines and principles of The Lost Found Nation of Islam religion as taught by Elijah Muhammad.

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(9) In doing the work as a traveling minister I am not based or assigned to any one particular mosque or temple but I am given a roving commission or authority by Elijah Muhammad, our leader, to teach and preach to the big crowds that I draw wherever I go.

(10) While my ministry above described is that of a leader made so by the Honorable Elijah Muhammad he is, however, my leader and it is he that I look to as my spiritual guide and head and I represent him directly as a minister and ambassador for the religion of the Lost Found Nation of Islam as taught by the Honorable Elijah Muhammad, throughout the entire United States.

(11) I have been specially designated by The Honorable Elijah Muhammad to act as assistant to his son Herbert Muhammad, as special representative and ambassador, to the Islamic Nations in the Middle East such as Egypt, Saudi Arabia, Pakistan, Turkey, Lebanon and Syrian governments and a few of which I went to with Herbert Muhammad, as his assistant. Each of us being traveling ambassadors and ministers of The Lost Found Nation of Islam and of The Messenger Elijah Muhammad speaking, preaching and explaining all about our religion and our prophet The Honorable Elijah Muhammad. Herbert Muhammad and I spoke for 45 minutes at the invitation of President Nassar on the TV station in Cairo, Egypt; and we also together spoke at the thousand year old Alazar University and at the Islamic University at Cairo where 600 people listened to both of us speak. We told about the Honorable Elijah Muhammad and the religion of The Lost Found Nation as taught by him as The Messenger. We did this so as to show similarities between the Islamic Religion and The Lost Found Nation of Islam religion as

taught by Elijah Muhammad. We had three meetings with President Nassar to discuss the matter so that he could better understand and appreciate the great work of Elijah Muhammad. Almost every day while we were in Egypt I attended at least once a day at a mosque in Cairo and prayed and worshipped. The presidents of Lebanon and Syria invited Herbert Muhammad and me, as his assistant, to come to their countries as we had visited Egypt. President Nassar asked both of us to give The Honorable Elijah Muhammad his regards and best personal wishes. I was, while there, presented 75 Holy Quorans by the Islamic officials.

(12) While Herbert Muhammad and I were in the Middle East we were invited as ministers and ambassadors of The Honorable Elijah Muhammad to make a pilgrimage to the Holy City of Mecca by Prince Faisal of Saudi Arabia. He offered to open up and allow us the extraordinary privilege to enter the house that Abraham built. This is a holy place that thousands and thousands of Islamites would give anything to even see and touch and, here we were offered the right to actually enter it!

(13) Herbert Muhammad and I were invited to come to visit Istanbul, Turkey as guests of the Government and while there we were asked about our religion and questions answered as ministers. We were also invited to meet with the Supreme Council of Islam in Pakistan and explain to them about our religion and our leader The Honorable Elijah Muhammad. With the authorization of our leader we expect someday to respond to these various invitations and speak as ministers on the religion of The Lost Found Nation of Islam as taught by Elijah Muhammad, the messenger of Allah.

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(14) All of the above stated privileges and blessings that I have enjoyed since being recognized by The Honorable Elijah Muhammad would not have come to me had it not been for him as The Messenger to whom I am indebted for a new found life of doing good as a minister. I am privileged to contribute to the welfare of the black man in America by the new hope for them found in The Lost Found Nation. I would never have had the blessing and privilege of the honors bestowed upon me by the Islam World in the Middle East if it had not been for the Honorable Elijah Muhammad. I am proud of my new name, Muhammad Ali, given to me by the Honorable Elijah Muhammad. It is two of the attributes of Allah. That name has given to me great enthusiasm and a burning zeal as a teacher and preacher of the religion of The Lost Found Nation of Islam to teach and preach it far and wide using everything and every power to do it that I can draw from in my whole life, soul and body.

This has given me the conviction that I have a special message from The Honorable Elijah Muhammad for the welfare and peace of millions of my fellow black men in America as a regular minister of religion as defined in Section 16 (g)(1) and (g)(2) of Title I of the Universal Military Training and Service Act and Section 1622.43 (a)(2) and Section 1622.43 (b) of the Selective Service Regulations (32 C. F. R. 1622.43 (a)(2) (b)). I have been duly recognized by the head and leader of the religion known as The Lost Found Nation of Islam, the Honorable Elijah Muhammad and do regularly and customarily preach and teach the doctrines and principles of such religion as my vocation and not incidentally and not irregularly for an average of over 40 hours per week for 52 weeks per year.

I refer to and make a part hereof, the signed accompanying statement of The Honorable Elijah Muhammad and

Exhibit A-2

the signed statements of other persons also accompanying this statement irrefutably proving this fact. I request that the Honorable Judge Lawrence Grauman, Special Hearing Officer of the Department of Justice forward all of these said statements to the Honorable T. Oscar Smith, Assistant Attorney General, Department of Justice, Washington, D. C. who is especially requested to forward each and every one of said statements along with and attached to this my personal statement to the Kentucky Appeal Board and the Department of Justice if, as and when the recommendation of the Department of Justice is sent by the Assistant Attorney General to the Appeal Board.

The Appeal Board is also hereby requested to file all of the statements and consider them before classifying me and that the tentative classification made by the Appeal Board that caused the file to be sent to the Department of Justice be changed to Class IV-D.

In the alternative, the proper action by the Appeal Board should restore to me my I-Y Classification as required by Section 1622.17 of the Selective Service Regulations (32 C.F.R. 1622.17). The reason for this is that I was found by the Secretary of Defense at Washington, D.C., under standards of the Defense Department not currently qualified for service in the Armed Forces and qualified only in time of war or national emergency declared by the Congress and no such war or emergency has been declared by the Congress, and the Secretary of Defense has at no time reversed his finding that I should be put in I-Y. The local board and the officials at the induction station that conducted preinduction physical examination and declared me to be acceptable for service acted contrary to law in reversing the Secretary of Defense and deprived me of my rights contrary to the "fair and just" provisions of the

Exhibit A-2

Act and Section 1622.1(b) and (d) of the Selective Service Regulations (32 C. F. R. 1622.1(b) and (d)) when they took the I-Y Classification away from me and put me in Class 1-A which said classification is an illegal one.

I wish to apologize for not having, previously to this occasion, presented all of the above stated details on my sincerity as a conscientious objector and all of the facts showing that since the early part of 1964 until now I have been a regular minister of religion teaching and preaching the doctrines and principles of The Lost Found Nation of Islam as revealed by The Honorable Elijah Muhammad and that I have done my ministry as my vocation and not incidentally to anything else.

It is true that the local board did not have all these details but the failure at my personal appearance to give to it the details was due to my ignorance of the law and the regulations and the fact that my attorney, Edward Jacko, Esq., was not skilled as an expert in the Selective Service Law and did not understand or realize the legal significance of the facts of my life showing that I was a regular minister of religion under the Act and Regulations. Here and now since 1964 the above facts have existed and are real truths in my life showing my exemption as a minister. Due to these circumstances that were entirely beyond my control they were not previously presented to the local board or to the appeal board until now through this my statement.

I have only recently learned of my rights to the exemption as a minister of religion, although it existed since 1964. I was recently advised by Mr. Robert Arum, Esq., of New York City to confer with my new counsel who has properly and fully advised me of my rights as a minister, and this was the first time I had found out about my rights.

Exhibit A-2.

This is now my first opportunity to present the facts of my ministry in proof of my sincerity as a conscientious objector to the Selective Service System and the Department of Justice. These are new and vital facts which should be received. There has been no deliberate neglect on my part and the failure of my attorney, Edward Jacko, to properly and timely present my claim as a minister of religion in proof of my sincerity as a conscientious objector. It was due to excusable neglect and lack of expert experience in Selective Service matters on his part and I should not be penalized for his not having previously submitted all of this material to the local board.

There is still time and the "fair and just" provisions of the Act and of Section 1622.1 (b) (32 C. F. R. 1623.1 (b)) as well as the due process clause of the Fifth Amendment to the Constitution require that (1) the hearing officer forward all of the material that I submit to him to the Department of Justice; (2) that the Assistant Attorney General in Washington forward all of the same material to the Appeal Board; and (3) that the Appeal Board file the same and consider each and every one of said statements and documents together with all the rest of the file in determining the proper classification that I am entitled to under the Act and the Regulations.

This request is not made for the purpose of delay but is made only in order that justice may be done now instead of later and if it is not done now then greater delay will ensue because I will be compelled to request the local board for a reopening under Sections 1625.1 and 1625.2 of the Selective Service Regulations (32 C. F. R. 1625.1, 1625.2) and make a special application to the National Director of Selective Service to exercise his discretion and that he make a written request to the local board to reopen the

Exhibit A-2

case in my behalf in order to prevent great hardship and a greater injustice as he is authorized to do under Section 1625.3 of the Selective Service Reguations (32 C. F. R. 1625.3).

This procedure cannot be followed until after the return of the file to the local board and if granted then instead of now would result in a complete reprocessing of the case causing a much longer delay which could and would be avoided completely now by granting the request here made and do as requested in items (1), (2) and (3) at the beginning of this paragraph.

Respectfully submitted,

.....

MUHAMMAD ALI
(New name)

.....

CASSIUS MARCELLUS CLAY, JR.
(Slave name)

CERTIFICATE OF ATTORNEY

I, HAYDEN C. COVINGTON, an attorney at law who has been retained to represent the above-named registrant, do hereby certify that I prepared the above and foregoing document based on the facts given to me by the registrant as his attorney.

.....

HAYDEN C. COVINGTON
34-44 76th Street
Jackson Heights, New York 11372

Exhibit A-3

Cassius M. Clay, Jr.—Conscientious Objector
Hearing August 23, 1966

[EMBLEM]

IN THE NAME OF ALLAH

ELIJAH MUHAMMAD
Messenger of Allah
4847 South Woodlawn Avenue Chicago, Illinois 60515

July 28, 1966

The Selective Service System
Kentucky Appeal Board
and to the
Department of Justice
Washington, D.C.

Re: Local Board Registrant
Cassius M. Clay
No. 15-47-42-127
a/k/a Muhammad Ali

Gentlemen:

This statement of fact is to help you arrive at the correct classification of the above-named registrant who has conscientious objections to combatant and non-combatant military service as a regular practicing propagator, minister, evangelist and ambassador of the Nation of Islam (the lost found nation) a duly constituted and legally religious body of Islam in the United States of America of which I am the leader and messenger of Allah, having authority to appoint ministers, evangelists, and ambassadors of which Muhammad Ali is one in good standing, pursuing the ministry of Islam since I gave him the name of Muhammad Ali in 1964.

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In the religion of the Lost Found Nation of Islam I have been apointed the messenger of Allah to this my people (the lost and found) of the nation of Islam here in America who look to me for guidance and leadership. My word is bond as to the interpretation of the law and suidans of the religion of Islam as found in the Holy Qur-An.

The religion of the Nation of Islam requires its followers to believe in one god, Allah, his prophets, Abraham, Moses, Jesus, and Muhammad, the last messenger of Allah (God) and the scriptures that they bring to us to keep up constant prayer to Allah, and spend (give charity) in the cause of righteousness of Islam based on charity and love of truth of the brotherhood of the believers of the Nation of Islam doing nothing to any person that he would not have done unto himself.

Each and every one of the Lost Found Nation of Islam must have and practice self-respect and respect of others and must obey those in authority over him whether believer or non-believer in government so long as the orders and commands do not require one of the Nation of Islam to do something that conflicts with the law of Allah as it appears in the Holy Qur-An and expounded by the teachers of Islam and myself throughout the world. The law of Allah does not permit a Muslim to be an aggressor, fight only those who fight with Muslims, the law of Islam further discredits a Muslim as being a Muslim who will fight on the side of a non-Muslim though he may be his near of kin, or wars of unbelievers or whether such wars are between disbelievers of Islam or against Islam (the Muslims), of any nation other than Islam or to bear arms in the armed forces of any nation other than Islam or to perform any non-combatant service or work of any kind under the di-

rection of the authorities acting under any conscription of law of war or fighting others, the beliefs of the Lost Found Nation of Islam.

Islam means peace. A Muslim is one who has made peace with God and man. The greeting of one Muslim to another is peace "as salaam akaikum" which means peace be unto you. When given, the greeting calls for a response of peace "wa alaikum salaam," which means peace be unto you or literally to be at peace.

According to that taught by the Holy Qur-An, a Muslim is one who faithfully practices the teaching of the religion.

It is the duty of each Muslim to propagate the faith and if he does not propagate or spread the faith, he is not a good Muslim. Each one must live and carry into practice the principle of the religion of Islam. Belief in Allah means nothing unless carried into action and practice. Muslim, is a name given to those who believe by Abraham (Holy Qur-An 22:78) means one who submits to the will of Allah (God).

Each Muslim is required to teach people of peace that the religion of Islam teaches. This attendance at the mosque is to help speed up the job of the propagator. Everyone is the same and on the same basis as the propagator, minister or evangelist. Our field or the field of each Muslim propagator is the world at large or mankind at large. Each Muslim must respect self and others. It is incumbent upon all the lost found Muslims to evangelize. We believe in the principles expressed in the Bible where Jesus said, "I will make you fishermen of men" applies to each Muslim because we are under obligations to gather out or fish for the lost found believers which means to get them into the

Exhibit A-3

religion of peace, "Islam." The conversion work is two-fold: (1) support the meetings and (2) talk to interested persons and bring them to the meetings after each believer fishes them out of the world of mankind symbolic of pulling them out of a lake of fire. (Bible: Jude 23) (Holy Qur-An; on a Brink of Fire).

Muslims believe in all the prophets of Allah (God) such as Abraham, Job, Noah, Jeremiah, Moses, Jesus, Daniel and Muhammad, and all the scripture that they brought to us.

The attributes (name) of God is wisdom based on knowledge and the only way one can have that attribute of God is to get knowledge which comes by study. This is why he must be a believer or one born of Allah by nature.

Our Muslim schools are established. All Muslims seek to educate children in their own schools under a believing teacher of Islam. In Islam the child must be taught the knowledge of self and his religion, Islam and history of the world before entering into said other teachings. Religion and education go together.

The Muslims—or believers worship places are called mosques and temples. Mosque means a prayer house. A temple is where teaching is carried on.

In our schools, the boys and girls—after the age of 6—are separated and taught in class rooms to self. We must have, and do have, an orderly arrangement. Just as the heavenly bodies are regulated, controlled and in their respective orbits submissive to the attraction of sun, so is the Nation of Islam to Allah.

Each Muslim is to try and attend the teachings of history and religion: Wednesdays, Fridays, and Sundays—if health

Exhibit A-3

and business permits them. Muhammad Ali attends such meetings regularly and customarily preaches at such meetings. He is a very sincere minister.

I am permitted to confer the attributes (names) of Allah on my faithful laborers.

Some of my main authority is sometimes delegated to preside over any mosque of believers that I am the head of to keep them active in fishing for men from the lake of fire which means the world of mankind outside of Islam. I have delegated to Muhammad Ali the permission to preach at all our mosques in the United States.

There is no compensation to the teachers of Islam. Muhammad Ali is not paid for preaching. But, he is not prohibited from accepting charity, as all ministers who are confined in the way of Allah must be cared for from the charity of the believers. It is spelled out in the Holy Qur-An that it is the duty of each Muslim to spend or give all that he can in the cause of Islam, and Muhammad Ali spends over 90 per cent of all of his time to study and preaching the doctrines and principles of his religion publicly and at every time and place he finds a person with a listening ear which makes his ministry his vocation in life.

It is the prayer of each Muslim that "my prayer and my sacrifice, my life and my death is all for Allah." This means that each Muslim must fish for men by preaching and propagating the faith to save others from the lake of fire as faithful followers of Allah. Muhammad Ali has accepted this duty.

/s/ ELIJAH MUHAMMAD
Messenger of Allah
Elijah Muhammad.

Exhibit B

Cassius M. Clay, Jr.—Conscientious Objector
Hearing August 23, 1966

MUHAMMAD SPEAKS, AUGUST 26, 1966, p. 28

The Messenger of Allah Presents

THE MUSLIM PROGRAM

WHAT THE MUSLIMS WANT

This is the question asked most frequently by both the whites and the blacks. The answers to this question I shall state as simply as possible.

1. We want freedom. We want a full and complete freedom.

2. We want justice. Equal justice under the law. We want justice applied equally to all, regardless of creed or class or color.

3. We want equality of opportunity. We want equal membership in society with the best in civilized society.

4. We want our people in America whose parents or grandparents were descendants from slaves, to be allowed to establish a separate state or territory of their own—either on this continent or elsewhere. We believe that our former slave masters are obligated to provide such land and that the area must be fertile and minerally rich. We believe that our former slave masters are obligated to maintain and supply our needs in this separate territory for the next 20 to 25 years—until we are able to produce and supply our own needs.

Since we cannot get along with them in peace and equality, after giving them 400 years of our sweat and blood and

receiving in return some of the worst treatment human beings have ever experienced, we believe our contributions to this land and the suffering forced upon us by white America, justifies our demand for complete separation in a state or territory of our own.

5. We want freedom for all Believers of Islam now held in federal prisons. We want freedom for all black men and women now under death sentence in innumerable prisons in the North as well as the South.

We want every black man and woman to have the freedom to accept or reject being separated from the slave master's children and establish a land of their own.

We know that the above plan for the solution of the black and white conflict is the best and only answer to the problem between two people.

6. We want an immediate end to the police brutality and mob attacks against the so-called Negro throughout the United States.

We believe that the Federal government should intercede to see that black men and women tried in white courts receive justice in accordance with the laws of the land—or allow us to build a new nation for ourselves, dedicated to justice, freedom and liberty.

7. As long as we are not allowed to establish a state or territory of our own, we demand not only equal justice under the laws of the United States, but equal employment opportunities—Now!

We do not believe that after 400 years of free or nearly free labor, sweat and blood, which has helped America become rich and powerful, that so many thousands of black people should have to subsist on relief, charity or live in poor houses.

Exhibit B

8. We want the government of the United States to exempt our people from ALL taxation as long as we are deprived of equal justice under the laws of the land.

9. We want equal education—but separate schools up to 16 for boys and 19 for girls on the condition that the girls be sent to women's colleges and universities. We want all black children educated, taught and trained by their own teachers.

Under such schooling system we believe we will make a better nation of people. The United States government should provide, free, all necessary text books and equipment, schools and college buildings. The Muslim teachers shall be left free to teach and train their people in the way of righteousness, decency and self respect.

10. We believe that intermarriage or race mixing should be prohibited. We want the religion of Islam taught without hinderance, or suppression.

These are some of the things that we, the Muslims, want for our people in North America.

WHAT THE MUSLIMS BELIEVE

1. WE BELIEVE in the One God Whose proper Name is Allah.

2. WE BELIEVE in the Holy Qur-an and in the Scriptures of all the Prophets of God.

3. WE BELIEVE in the truth of the Bible, but we believe that it has been tampered with and must be reinterpreted so that mankind will not be snared by the falsehoods that have been added to it.

4. WE BELIEVE in Allah's Prophets and the Scriptures they brought to the people.

Exhibit B

5. We Believe in the resurrection of the dead—not in physical resurrection, but in mental resurrection. We believe that the so-called Negroes are most in need of mental resurrection; therefore, they will be resurrected first.

Furthermore, we believe we are the people of God's choice as it has been written, that God would choose the rejected and the despised. We can find no other persons fitting this description in these last days more than the so-called Negroes in America. We believe in the resurrection of the rignteous.

6. We Believe in the judgement; we believe this first judgement will take place as God revealed, in America . . .

7. We Believe this is the time in history for the separation of the so-called Negroes and the so-called white Americans. We believe the black man should be freed in name as well as in fact. By this we mean that he should be freed from the names imposed upon him by his former slave masters. Names which identified him as being the slave master's slave. We believe that if we are free indeed, we should go in our own people's names—the black people's of the earth.

8. We Believe in justice for all, whether in God or not; we believe as others, that we are due equal justice as human beings. We believe in equality—as a nation—of equals. We do not believe that we are equal with our slave masters in the status of "freed slaves."

We recognize and respect American citizens as independent peoples and we respect their laws which govern this nation.

9. We Believe that the offer of integration is hypocritical and is made by those who are trying to deceive the

black peoples into believing that their 400-year-old open enemies of freedom, justice and equality are, all of a sudden, their "friends." Furthermore, we believe that such deception is intended to prevent black people from realizing that the time in history has arrived for the separation from the whites of this nation.

If the white people are truthful about their professed friendship toward the so-called Negro, they can prove it by dividing up America with their slaves.

We do not believe that America will ever be able to furnish enough jobs for her own millions of unemployed, in addition to jobs for the 20,000,000 black people as well.

10. WE BELIEVE that we who declared ourselves to be righteous Muslims, should not participate in wars which take the lives of humans. We do not believe this nation should force us to take part in such wars, for we have nothing to gain from it unless America agrees to give us the necessary territory wherein we may have something to fight for.

11. WE BELIEVE our women should be respected and protected as the women of other nationalities are respected and protected.

12. WE BELIEVE that Allah (God) appeared in the Person of Master W. Fard Muhammad, July, 1930; the long-awaited "Messiah" of the Christians and the "Mahdi" of the Muslims.

We believe further and lastly that Allah is God and besides HIM there is no God and He will bring about a universal government of peace wherein we all can live in peace together.

Transcript of District Court's Oral Findings

(Rendered June 20, 1967)

The Court:

Well, I have read the draft board file and I have reached the conclusion there is ample evidence in the file to support the action of the draft board. Mr. Covington has said basis in fact must be found in the draft board file, and I think it [310] is found here.

Now, just to summarize some of the evidence that I find that I conclude does support the action of the draft board, first I want to describe the file. I am doing this for the record, not because counsel on either side need it described for them. You know it as well as I do. It is not the neatest of files. There are many pages in it. To begin with there is I think the main portion of the file, just a group of loose sheets in the file and they are not arranged chronologically. They are numbered for convenience and identification consecutively as they appear in that file, but they are not in any chronological or other logical form, logical sequence.

I will ask that we have order in the courtroom. I do not intend to be facetious and what I say is not calculated to inspire laughter and what I had to say is serious. At [311] least it is serious to me and I am sure it is serious to the Defendant and I hope it is serious to prosecution.

I am going to refer to these pages by the pencil figures that appear thereon. In other sections of the file there is pointed out there is quite a volume of petitions signed by brothers of the Defendant's religious faith. Most of them are on mimeographed forms. There are some variations in the forms. You will find one form an identical form with many signatures on those petitions, and then another form. I read the various forms and observed that there are quite

a number of signatures. I will take counsel's word for the number of signatures appearing thereon. I did not count the signatures. I did observe there are quite a volume of them.

Then there are those other miscellaneous—what Mr. Covington [312] has referred to and I refer to as crank letters of people advising the draft board what to do, just as I have received many advising me what I should do. I did not even read them. I have asked my secretary to file them according to states. If we ever have to refer to them, we will refer to them in that way. I don't anticipate that we will.

I will say for the record out of the presence of the jury that I have received quite a volume of what I call crank mail and have received some telegrams. Most of them start off with the statement that they are not presuming to tell me what to do, and then they proceed to do that. That is the form of most of the letters I receive asking for jury excuses. In paragraph 1 they protest how conscientious they are of their civic responsibility and in paragraph 2 why they don't want to serve.

Proceeding further, in referring [313] to matters in the file which I believe prove the basis in fact for the action of the draft board, and I'm not referring to any crank letters, I am not referring to newspaper clippings, and again I want to say that these letters are not arranged chronologically and I am referring to them in the order in which they appear in the file, which is not a chronological order.

On page 260 is a letter dated October 19, 1966. This was after the Defendant has made his claim for ministerial exemption. It is a typewritten letter and it is signed by the registrant, the Defendant himself, and in that letter addressed to the draft board he asks leave to go to Mexico to negotiate a fight and to observe his prospective opponent

in action. He didn't say anything in that letter that he was going there to preach the word of Allah or to seek converts, but his request to [314] leave the country to go to Mexico was to negotiate a fight and to observe his prospective opponent in action. I think that would give some support to the finding of the draft board that he was a professional boxer as he claimed to be.

Then on page 467 is another letter, typewritten letter, signed by the registrant, the Defendant Clay, dated July 7, 1966. This letter was before his claim for ministerial exemption. The previous one was after. In that letter he asked leave to go to England to defend his world heavy weight championship and he also advised in that letter he would later want to go to Germany to defend his title there.

But again in the letter to the draft board the proposition of his projected visits out of the country to England and to Germany to defend his heavy weight championship. Again, he made no mention that he was going to those countries or that he would be going to those countries to preach the word [315] of Allah.

Then at page 458 is another letter, typewritten and signed by registrant, Defendant Clay, dated August 8, 1966, which was a short time before he made his claim for ministerial exemption. In that letter he asked leave to go to Germany to defendant [*sic*] his world heavy weight championship. He stated in his letter previously that he would have such a request. In July he told them he would have a request to go to Germany and, true to his word, he did have such a request to go there, and why, to defend his world heavy weight championship there. Again, the request was not to go there for the purpose of preaching the word of Allah.

Then page 474 is another letter in his own handwriting signed by the registrant, Defendant Clay. This letter is dated April 26, 1966, and in this letter he asked to go to [316] England to defend his world heavy weight boxing title. Again, no mention that he wanted to go there to preach the word of Allah.

At page 491 is another letter in his own handwriting and signed by the registrant, Defendant Clay, dated March 17, 1966, in which he protests the reclassification by the draft board and in his letter he states the reasons he does so protest. He protests his reclassification for the reason that the reclassification has and does at this time impose great hardship upon me as heavy weight champion of the world now at age 24. He asked the draft board to reconsider his classification. That is his protest, because of hardship. He says nothing there about a ministerial exemption.

Then at page 504, letter dated April 16, 1966 in his handwriting, signed by the registrant, Defendant Clay. This is a month later than the [317] previous letter. Again, he protests his reclassification for the following reasons:

A, he says he is the sole support of his mother. B, because he had just gone through an expensive divorce and made a settlement of $150,000 on his wife and was required to pay her $12500.00 per month alimony, the conclusions being he couldn't do that on a soldier's pay. But, again, he protests his reclassification for entirely different reasons. I don't know why he didn't think then to claim that he was a minister, but he did not.

Then at page 524 appears another letter dated February 14, 1966, in his own handwriting. The letter is signed by

the registrant, Defendant Clay. He protests his reclassification for the following reasons:

One, my occupation is professional boxer—and he goes on with that explanation. Two, that he married August 14, 1964, divorced January 11, [318] 1966 because his wife failed to comply with her premarital agreement as to the tenets of the Muslim faith. Then a divorce was expense. Three, that he is a devout Muslim and has convictions also against killing or bearing arms. Now, in this letter he protests his Muslim faith, his Muslim religion, but he does not say he is a minister. He says that his marriage broke up because his wife did not follow through with her premarital agreement with the tenets of his faith, the Muslim faith, and then he says that he is a devout Muslim and has conscientious scruples against killing or bearing arms, but he makes no claim to being a minister.

Now, we are well aware that the Selective Service Act recognizes conscientious objectors. As I remember it, a conscientious objector may be assigned to non-combatant duty in the armed forces of the United States or he may be assigned [319] to work of national importance under civilian direction. But that problem has never been brought to you. I don't think he has said in so many words, "I am a conscientious objector, I do not believe in killing or bearing arms and therefore I want to be assigned to non-combatant duty or to work of national importance under civilian direction."

I think the basis in fact for the action of the draft board is amply supported by the evidence appearing in the file, and I find that there was basis in fact for such action. I deny the motion for acquittal upon all of the grounds asserted.

It is now five minutes after four. How much time will you gentlemen want to present your arguments?

First Opinion of the Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 24991

CASSIUS MARSELLUS CLAY, JR.,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

(May 6, 1968)

Before COLEMAN, AINSWORTH and DYER, *Circuit Judges.*

AINSWORTH, Circuit Judge: "It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it." Chief Justice Edward Douglass White, *Selective Draft Law Cases*, 245 U. S. 366, 378, 38 S. Ct. 159, 161 (1918).

Cassius Marcellus Clay, Jr., also known as Muhammad Ali, heavyweight professional boxing champion of the world, was convicted after trial by jury on an indictment charging violation of 50 U.S.C. App. § 462, for knowingly and wilfully refusing to report for and submit to induction into the armed forces of the United States. Clay's

draft case has been through practically every phase of selective service procedure, beginning with the date he registered on April 18, 1960, until he was ordered to report but declined to submit to induction on April 28, 1967, and was thereafter convicted by jury trial held on June 19, 20, 1967. On four different occasions he was classified 1-A (Available for military service) by his local board, twice by two different appeal boards (in Kentucky and Texas) and once by the National Selective Service Appeal Board (the Presidential Appeal Board). In every instance the vote of the boards was unanimous.

There has been no administrative process which Clay (Ali) has not sought within the Selective Service System, its local and appeal boards, the Presidential Appeal Board and finally the federal courts, in an unsuccessful attempt to evade and escape from military service of his country. Being entirely satisfied that he has been fairly accorded due process of law, and without discrimination, we affirm his conviction.

The pertinent but lengthy chronology of his case follows:

April 18, 1960—Clay (Ali) registered for selective service with Local Board No. 47, Louisville, Kentucky.

March 9, 1962—Registrant was classified 1-A by Local Board No. 47, Louisville, Kentucky.

March 26, 1964—Registrant was classified 1-Y as a result of a physical examination, as being not acceptable for induction in the armed forces and not qualified under current standards.

February 17, 1966—Registrant was reclassified 1-A by Local Board No. 47, Louisville, Kentucky, after having been considered by the Examining Station in accordance

with current regulations and found fully acceptable for induction.

February 18, 1966—1-A classification notice was mailed to registrant. Clay (Ali) was furnished Special Form for Conscientious Objector (SSS Form 150).

February 28, 1966—Special Form for Conscientious Objector was filed by registrant with the local board. This was the first time such a claim had been made. Registrant requested a personal appearance before the local board in reference to the change of his classification from 1-Y to 1-A.

March 17, 1966—The local board granted a personal appearance before it by registrant and again classified him 1-A.

March 28, 1966—Registrant appealed the 1-A classification to the Kentucky Appeal Board.

May 6, 1966—The Kentucky Appeal Board reviewed the file de novo and tentatively determined that the registrant was not entitled to the 1-O, conscientious objector or lower, classification. The complete file was referred to the Department of Justice for an advisory recommendation as provided by Selective Service Regulations (32 C.F.R. § 1626.25), and an investigation by the Federal Bureau of Investigation was requested by the Department.

August 23, 1966—Registrant filed a letter request with Local Board No. 47, Louisville, Kentucky, for reclassification to IV-D as a minister of the Lost Found Nation of Islam (Black Muslims).

August 23, 1966—The FBI investigation having been made, a special hearing was held in Louisville, Kentucky,

to consider registrant's conscientious objector claim. The Hearing Officer reported his belief that the registrant was sincere in his conscientious objector claim.

November 25, 1966—The Department of Justice, Office of Legal Counsel, Conscientious Objector Section, recommended to the Kentucky Appeal Board that the request of the registrant for conscientious objector status be denied. Registrant was mailed a copy of the recommendation on November 29, 1966.

January 10, 1967—The Kentucky Appeal Board denied the requested conscientious objector claim and notified the registrant that he was classified 1-A.

January 12, 1967—Local Board No. 47, Louisville, Kentucky, reviewed the registrant's complete file but declined to reopen his classification. The board agreed unanimously that registrant was not entitled to the IV-D ministerial exemption.

January 19, 1967—Pursuant to the written request of General Lewis B. Hershey, the National Director of Selective Service, Local Board No. 47, Louisville, Kentucky, reopened and considered anew the classification, including the claim for ministerial classification, and after re-examining the registrant's file again classified him 1-A, and notice of classification was mailed to registrant.

January 26, 1967—Registrant appealed the 1-A classification and requested that the Appeal Board for the Southern District of Texas (the place of his current domicile at Houston, Texas) hear the appeal.

February 15, 1967—The Appeal Board for the Southern District of Texas classified registrant 1-A and returned

his file to Kentucky on February 20, 1967, after finding that no new information had been submitted relating to his conscientious objector claim, and having considered and rejected his claim for ministerial exemption.

February 24, 1967—The National Director of Selective Service, General Lewis B. Hershey, appealed the registrant's classification to the National Selective Service Appeal Board (the Presidential Appeal Board). (See 32 C.F.R. § 1627.1 for the authority of the National Director to do so.) Registrant could not file such an appeal because the regulations (32 C.F.R. § 1727.3) require that one or more members of the appeal board dissent from the classification before a registrant has such a right to file the appeal himself.

March 6, 1967—The Presidential Appeal Board unanimously voted to classify the registrant 1-A, and a copy of "Minutes of Action Upon Appeal to the President" was forwarded to the local board on March 14, 1967.

March 14, 1967—Local Board No. 47, Louisville, Kentucky, ordered the registrant to report for induction on April 11, 1967, at Louisville, Kentucky.

March 24, 1967—Registrant requested a transfer of induction to Houston, Texas, which was granted by Local Board No. 61 at Houston.

March 29, 1967—Local Board No. 61, Houston, Texas, ordered registrant to report to it on April 28, 1967, for delivery to the induction station.

April 28, 1967—Registrant reported for but declined to submit to induction on the grounds of his religious beliefs as a minister of the Islam Religion.

May 8, 1967 Registrant was indicted for violation of 50 U.S.C. App. §462.

June 19, 20, 1967 Registrant was tried and convicted by a jury of the selective service violation for refusing to submit to induction, and sentenced to five years' imprisonment and a fine of $10,000.[1] This is his appeal from the conviction and sentence.

Clay (Ali) has no prior criminal record and no previous charges or convictions for crime, other than minor traffic violations.

The registrant has, therefore, exhausted every administrative remedy provided by Selective Service. He has also fully pursued his rights in the United States courts in a vain attempt to stop his induction before his trial and conviction in the present case.

In Kentucky, registrant, who is a Negro, filed suit in the United States District Court for the Western District of Kentucky to prevent his induction into the armed forces. In his suit he sought a declaration that the Universal Military Training and Service Act is unconstitutional on its face and as applied because of "systematic exclusion" of Negroes from membership on draft boards; also, for an injunction to restrain all draft boards in Kentucky, from performing their function until Negroes were appointed to boards in proportion to their ratio to

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[1] The District Judge said in this regard:

"Well, I am going to impose the maximum penalty because under the rules at the end of an appeal if it is reversed, why, of course it is nil. If it is affirmed it is then subject to motion to reduce, and I find that we get into problems when clemency is given at the time of sentencing and then following an affirmance there is another petition for clemency." (R. 277)

the population. He sought to enjoin further classification and induction of Negroes until this had been accomplished. The District Court denied relief, holding that no evidence had been submitted and no contention made that Clay (Ali) had been deprived of any right of appeal or other administrative process of Selective Service; that there was no evidence that he had personally been singled out and subjected to punitive action or other discriminatory treatment by the System. The District Court said that the issues were not appropriate for judicial review until the registrant either submitted to induction or refused to submit to induction, at which time the issues could be raised either by habeas corpus or in defense to a criminal prosecution. The District Court also held that except in rare circumstances, not present here, it was not the function of the judiciary to enjoin the operation or enforcement of the Universal Military Training and Service Act. A stay of injunction pending appeal was refused. *Muhammed Ali* v. *Breathitt*, D. C., W. D. Ky., 1967, 268 F. Supp. 63. Registrant petitioned the Sixth Circuit for leave to appeal and for temporary restraining order pending appeal, which was denied, the Court taking cognizance of the District Judge's denial of a certification that immediate appeal was warranted and the denial of an order staying proceedings (Unpublished opinion, 6 Cir., Docket No. 17787, March 28, 1967.) The Sixth Circuit, on April 17, 1967, denied registrant's application for an order staying orders of the District Court and for an injunction pending appeal. (Unpublished opinion, 6 Cir., Docket No. 17834.) On the same day, the Supreme Court denied registrant's application for stay of the order of the United States District Court for the Western District of Kentucky, for injunction pending appeal and

denied leave to file a petition for mandamus. *Muhammad Ali* v. *Gordon*, 386 U. S. 1002, 87 S. Ct. 1365 (1967). Rehearing was denied by the Supreme Court on April 24, 1967. 386 U. S. 1027, 87 S. Ct. 1388. On the same day, the Supreme Court also denied petition for writ of certiorari to the Sixth Circuit. *Muhammad Ali* v. *Gordon*, 386 U. S. 1018, 87 S. Ct. 1376.

In Texas the registrant filed a similar suit in the United States District Court, Southern District of Texas, raising substantially the same legal contentions as those in the Kentucky suit. The District Court (Judge Hannay) denied relief and ruled that the selectee's remedy could only arise after the final step toward military induction and should he refuse this step, his remedy would lie in whatever defense he claimed in the criminal prosecution. The District Judge said that a second remedy available was that of habeas corpus in the event the selectee should take the final step toward military induction while claiming that his induction was illegal, unconstitutional and void. *Muhammad Ali* v. *Connally*, D. C., S. D. Tex., April 28, 1967, 266 F. Supp. 345.

The registrant appealed from the District Court decision. He also filed application to stay and for interim injunction pending appeal, which was denied by the District Judge. He then petitioned Judge John R. Brown of the Fifth Circuit (now Chief Judge) for injunction pending appeal, which was denied,[2] and the matter was then re-

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[2] Judge Brown in detailed reasons for his refusal (unpublished opinion) said in part:

> "I conclude that on traditional principles the equities—which includes the public interest—argue against such relief. I would not intimate what the intrinsic merits are—but I am

ferred to a panel of this Court (Judges Gewin, Coleman and Simpson), which also denied the motion for stay and injunction pending appeal. (Unpublished order, 5 Cir., Docket No. 24714, May 11, 1967.)

After refusing induction on April 28, 1967, appellant filed another suit in the United States District Court, Southern District of Texas, on April 29, 1967, for similar relief, which was denied on May 1, 1967 by Judge Seals for substantially the same reasons assigned by Judge Hannay in the prior case, the District Judge being of the opinion that the subsequent refusal of induction did not suffice to create a remedy for injunctive relief. At the same time an application for a stay and for an interim injunction to the District Court pending appeal was also denied. A panel of the Fifth Circuit (Judges Gewin, Coleman and Simpson), on May 11, 1967, thereafter denied a motion for stay or injunction pending appeal of Judge Seals' decision. (Unpublished order, 5 Cir., Docket No. 24723.)

Appellant, having been indicted on May 8, 1967 for the selective service violation, then petitioned the Fifth Circuit for a writ of prohibition to restrain the impending

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convinced that the chances of success on appeal are so remote that I ought not to grant it.

. . . .

"Balancing these factors I do not think that the courts should intervene to test, on the application of every registrant, the statutory validity of the process. The law will not finally ever compel the unlawful conscription of a citizen or permit criminal punishment for failure to submit to unlawful orders. That inconvenience, hardship or risk may be suffered if and until Congress prescribes other remedies—one of the perils of civilization and citizenship in a nation which calls on its citizens for the protection of its national and international interests."

trial, which petition was denied by a panel of this Court (Judges Tuttle, Washington and Simpson) on May 15, 1967. (See unpublished order, 5 Cir., in Docket No. 24750).[3]

We summarize the principal questions for decision as follows:

1) Was the selective service induction order to appellant invalid because of alleged systematic exclusion of Negroes from draft boards?

2) Did the District Court err in refusing to grant appellant's request for the production of certain documentary and other evidence?

3) Was there a basis in fact for the denial to appellant of a ministerial exemption?

4) Was there a basis in fact for the denial to appellant of conscientious objector status?

5) Did the proceedings as a whole, selective service and judicial, constitute a prohibited bill of attainder?

I.

The Alleged Systematic Exclusion of Negroes From Selective Service Boards

The Selective Service System is based on the constitutional provision which grants to Congress the power "To raise and support Armies . . ." U. S. Const. art I, § 8(12).

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[3] The appeal to the Fifth Circuit from Judge Hannay's ruling (Docket No. 24714) was dismissed for want of prosecution on July 28, 1967; and the appeal from the ruling of Judge Seals (Docket No. 24723) was dismissed for want of prosecution on September 5, 1967.

The Universal Military Training and Service Act provides (50 U.S.C. App. § 460(b)(3)) that the President is authorized to create civilian local boards and appeal boards. Each local board shall consist of three or more members to be appointed by the President from recommendations made by the respective governors of each of the states. No member of any local board shall be a member of the armed forces but each member shall be a citizen residing in the local board jurisdiction. Appeal boards shall also be composed of citizens who are not members of the armed forces and consist normally of five members appointed by the President upon recommendation of the governor. The appeal board shall be a composite board representative of the activities of its areas and shall include one member from labor, one member from industry, one physician, one lawyer and, where applicable, one member from agriculture. (32 C.F.R. § 1604.22.)

Thus the racial composition of the local and appeal boards about which appellant complains, because of the absence of a proportion of Negroes in accordance with their ratio to the population, results from appointment by the President upon recommendation of the governor of each state. The appointments are therefore federal, not state.

There is also a National Selective Service Appeal Board (sometimes called the Presidential Appeal Board) composed of three members who are appointed by the President from citizens who are not members of the armed forces. This board acts for the President himself, being vested with the functions and duties of the President provided by the Act (50 U.S.C. App. § 460(b)(3)), which reads in pertinent part as follows:

> "The President, upon appeal or upon his own motion, shall have power to determine all claims or questions with respect to inclusion for, or exemption or deferment from training and service under this title, and the determination of the President shall be final."

This board shall be in all respects independent of the Director of Selective Service. (32 C.F.R. § 1604.6(a), (b), (c).) It was stipulated in the present record that one of the three members of the Presidential Appeal Board was a Negro. However, there was no Negro member on any of the local or appeal boards which considered appellant's draft case.

According to the report of the National Advisory Commission on Selective Service (the Marshall Commission), in Kentucky, only 0.2% of 641 local board members is Negro, though 7.1% of the total population is Negro. In Texas, only 1.1% of local board members is Negro, though 12.4% of the total population is Negro. In the City of Louisville, the total population (1964) is 389,044, of which the white population is 310,717 and the Negro population 78,245, or 21% of the total population.[4] The Jefferson County, Kentucky, total population (1960) number 610,947, of which there are 532,057 whites and 78,350 Negroes, or 12.8% of the total population. In Harris County, Texas, of a total population of 1,243,158, 19.81%, or 246,351, is Negro.[5]

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[4] Appellant's brief asserts the Negro population of Louisville (1964) to be 78,327 and the percentage of Negroes to be 20.1%—a slight error. The difference is, of course, not significant. See Special Censuses, Series P-28, No. 1377, Louisville, Kentucky (United States Department of Commerce).

[5] Appellant in brief supplies other calculations from the record as follows: 9.60% of the total population of the Western District of Kentucky is Negro; 14.25% of the total population of the Southern District of Texas is Negro.

According to the Marshall Commission Report, the unequal percentage of Negroes on draft boards was not peculiar to Kentucky, Texas or the South, but the imbalance was nationwide. Only in the District of Columbia and in Delaware were there substantial percentages of Negroes on the boards. In twenty-three states, there were no Negroes on draft boards, the Report stated.[6]

Nevertheless the Marshall Commission said significantly in its report, "There is no evidence that the variability of the Selective Service System leads to any systematic biases against poor people, or Negroes, insofar as the final proportion of men serving in the Armed Forces is a measure of this."

As a direct result of the Marshall Commission Report, the President in his message to the Congress on Selective Service dated March 6, 1967, instructed the Director of the Selective Service System to work with the governors "to assure that all local boards are truly representative of the communities they serve and to submit periodic reports on the progress in this area."

The Universal Military Training and Service Act in its congressional declaration of policy declares that the obligations and privileges of serving in the armed forces should be shared generally in accordance with a system of selection which is "fair and just" (50 U.S.C. App. § 451(c)). The Act further provides (50 U.S.C. App. § 455(a)) that "The selection of persons for training and service . . . shall be made in an impartial manner, under such rules and regulations as the President may prescribe, from the persons who are liable for such training and service and who at the time of selection are registered and classified, but

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[6] For example, there were no Negroes on draft boards in such states as Indiana, Iowa, Kansas, Maine, Minnesota, New Jersey and Rhode Island.

not deferred or exempted: *Provided*, That in the selection of persons for training and service under this title . . . , and in the interpretation and execution of the provisions of this title . . . , there shall be no discrimination against any person on account of race or color: . . . ."

The Selective Service Regulations (32 C.F.R. § 1622.1(d)) provide, "In classifying a registrant there shall be no discrimination for or against him because of his race, creed, or color, or because of his membership or activity in any labor, political, religious, or other organization. Each such registrant shall receive equal justice."

Appellant argues that the quoted statistics evidence racial exclusion in the composition of draft boards, in violation of the Fifth Amendment. He cites *United States* v. *Jefferson County Board of Education*, 5 Cir., 1966, 372 F. 2d 836, 837, aff'd on rehearing, en banc, 380 F. 2d 385 (1967), cert. denied, sub nom. *Board of Education of the City of Bessemer* v. *United States*, 389 U. S. 840, 88 S. Ct. 77 (1967), where this Court said that it has frequently relied on percentages in jury exclusion cases and in other civil rights cases for evidence of deliberate discrimination against Negroes. He concludes that if systematic exclusion of Negroes is constitutionally barred in the composition of juries, their exclusion in the Selective Service System likewise infringes his rights and requires a holding that draft boards, such as those in Kentucky and Texas which considered appellant's case, have no jurisdiction over appellant or in fact over any Negro. Thus he argues that the local boards have acted beyond their jurisdiction and may not act as to that class of registrants (including appellant) against whom it is claimed the appointing process has discriminated. Appellant concedes that considerable progress in rectifying this disparity in the several states has been

made since the President's March 6, 1967, message to Congress on Selective Service, but contends that Negroes should not be selected in the future until the alleged systematic exclusion of members of that race from draft boards has ceased.

Appellant likens his classification and induction into the armed forces to a criminal prosecution because, as in a criminal prosecution, the Government restrains a registrant of his liberty and may even cause his death by sending him into combat.

No court has held, so far as we can determine, nor do we here, that a Negro registrant for selective service is entitled to be classified and inducted by a selective service board composed of a percentage of Negro members which the Negro population bears to the total population, or that a board lacks jurisdiction of a registrant unless so constituted. No question is raised that the boards which considered appellant's classification were not regularly and properly constituted under appointment by the President, recommended by the governor. We do not justify the failure to include substantial numbers of Negroes on such boards. The Selective Service System must not only be fair, it must likewise have the appearance of fairness. Negro draftees should be selected for military service by a system which gives Negro citizens a full participation in the selection process. The Marshall Commission affirmed the necessity of greater participation by Negroes who are underrepresented as a class on local draft boards. The Commission said that the Negro's position in the military manpower situation is in many ways disproportionate, even though he does not serve in the armed forces out of proportion to his percentage to the population. The President in his March 6, 1967, message to Congress said in this

regard: "The Nation's requirement that men must serve, however, imposes this obligation: that in this land of equals, men are selected as equals to serve. A just nation must have the fairest system that can be devised for making that selection." We concur with these remarks to the fullest. But nothing we have said justifies exemption from service in the armed forces for Negro registrants.

It is undeniable, as appellant contends, that conscription deprives an individual of his liberty and may even take his life. But we cannot properly compare the military draft to a criminal prosecution. There is no stigma attached to wearing the military uniform of the United States. To the contrary, it is a badge of the highest honor. Service under the flag of our country cannot properly be likened to imprisonment in a penitentiary. A proud nation with a long tradition of valor and bravery on the battlefield, with vivid memories in modern times of distant places where Americans have fought and died to preserve freedom, some with unusual names, such as Chateau-Thierry, Normandy, Iwo Jima and Khe Sanh, would never permit a comparison so odious. It is the same willingness of Americans to sacrifice their lives in the military service of the country which has made it possible to establish the United States as a free nation, and which has successfully warded off the encroachments of its enemies. "The knowledge that military service must sometimes be borne by—and imposed on—free men so their freedom may be preserved is woven deeply into the fabric of the American experience." President Johnson, Message on Selective Service to the Congress, March 6, 1967.

The Government argues—and we agree—that a draft board system which does not have a sufficiently representative number of Negro members is comparable to a mal-

apportioned legislature. The acts of such a legislature are not invalid and the laws which it passes are not null and void. The acts of a malapportioned legislature or local or county commission or board are acts of a de facto political authority and valid despite their failure to be apportioned in accordance with *Baker* v. *Carr*, 369 U. S. 186, 82 S. Ct. 691 (1962) and *Avery* v. *Midland County, Texas*, 390 U. S. 474, 88 S. Ct. 1114 (1968).

Nor is appellant's argument meritorious that composition of draft boards is similar to that of grand and petit juries. The right to trial by jury has specific constitutional authority. However, nothing in the Constitution or the Universal Military Training and Service Act requires racially proportionate selective service boards. It is not difficult to understand the reasons which support the prior rulings of the Supreme Court and this Court in the jury selection cases where convictions have been set aside for failure to have representative numbers of Negroes on jury venires. See *Whitus* v. *State of Georgia*, 385 U. S. 545, 87 S. Ct. 643 (1967); *Rabinowitz* v. *United States*, 5 Cir., 1966, 366 F. 2d 34; *Mobley* v. *United States*, 5 Cir., 1967, 379 F. 2d 768. The boards are administrative agencies with specific duties, many of them purely ministerial, which are provided for by the Act and Selective Service Regulations. A jury's verdict arrived at by secret deliberation has a finality which is not at all applicable to selective service classification and induction. As we shall see, draft board appeals are considered de novo and are not judicial proceedings.

The war powers of Congress to raise and support armies are constitutionally authorized and are of paramount public importance because they directly involve the protection and preservation of the nation itself. In this vital and

sensitive area it behooves the judiciary to recognize the imperative necessity for the maintenance of the national integrity as upheld by the military forces of the United States. The Universal Military Training and Service Act provides that "every male citizen of the United States" between certain ages shall register and be subject to induction in the armed forces of the United States. Exemptions from service, such as for conscientious objectors or ministers of religion, are matters of legislative grace. *United States* v. *Mohammed*, 7 Cir., 1961, 288 F. 2d 236, 242; *Parrott* v. *United States*, 9 Cir., 1966, 370 F. 2d 388, 391. It has been long established that there is no constitutional right to exemption from military service by virtue of conscientious objection or religious calling. *Wood* v. *United States*, 5 Cir., 1967, 373 F. 2d 894, 900, reversed on other grounds, 389 U. S. 20, 88 S. Ct. 3 (1967); *George* v. *United States*, 9 Cir., 1952, 196 F. 2d 445, 449. These exemptions do not spring from the Constitution but from the Congress. *George* v. *United States, supra.* The Supreme Court said in *Jacobson* v. *Massachusetts*, 197 U. S. 11, 29, 25 S. Ct. 358, 362 (1905), that despite the liberty secured by the Fourteenth Amendment a person "may be compelled, by force if need be, against his will and without regard to his personal wishes or even his religious or political convictions, to take his place in the ranks of the army of his country, and risk the chance of being shot down in its defense."

It will be recalled that there were seven different occasions on which appellant was classified 1-A; four by his local board, twice by two different appeal boards in Kentucky and Texas, and once by the Presidential Appeal Board. The appeals in each instance were considered

de novo.[7] "It is universally held that the Appeal Board considers matter of classification *de novo* and its classification is one of first instance, not a mere affirmance or reversal of the Local Board, and that any . . . prejudice on the local level is cured by a fair consideration on the appeal." *DeRemer* v. *United States,* 8 Cir., 1965, 340 F. 2d 712, 719; *United States* v. *Van Hook,* 7 Cir., 1960, 284 F. 2d 489, 491; *Ayers* v. *United States,* 9 Cir., 1956, 240 F. 2d 802, 809, cert. denied, 352 U. S. 1016, 77 S. Ct. 563 (1957); *Davis* v. *United States,* 8 Cir., 1953, 203 F. 2d 853. The action of the board of appeals completely supersedes the action of the local board is classifying appellant although the classification is the same. *Cramer* v. *France,* 9 Cir., 1945, 148 F. 2d 801; *United States* v. *Moore,* 7 Cir., 1954, 217 F. 2d 428, 431, 432. If the local board erred, the error was cured by the de novo action of the appeal board. *United States* v. *Chodorski,* 7 Cir., 1956, 240 F. 2d 590, 593.

The appeal to the Presidential Appeal Board was also de novo.[8] Any error or invalidity in the selective service

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[7] As to the appeal boards, the Regulations provide (32 C.F.R. § 1626.26):

"(a) The appeal board shall classify the registrant, giving consideration to the various classes in the same manner in which the local board gives consideration thereto when it classifies a registrant.

"(b) Such classification of the registrant shall be final, except where an appeal to the President is taken: . . . ."

"The state appeal boards make a de novo classification." Comment, *The Selective Service,* 76 Yale L. J. 160, 171 (1966).

[8] The powers of the President upon an appeal (and necessarily of the Presidential Appeal Board which acts for him) are as follows (50 U.S.C. App. § 460(3)):

". . . power to determine all claims or questions with respect to inclusion for, or exemption or deferment from training and

procedures up to and including the Presidential Appeal Board was cured by de novo consideration by that board which acted in the place and stead of the President himself. One third of the membership of the Presidential Appeal Board (one of three) was a Negro, which is obviously a greater proportion than Negroes bear to the total population. The decision of the board was unanimous that appellant should be classified I-A, which action thereby cleared the way for his induction into the armed forces. Nowhere in the record in this case or in appellant's brief do we find any specific charge or evidence of discrimination against appellant because he is a Negro. There are conclusory allegations that the absence of Negroes from local and appeal boards (other than the Presidential Appeal Board) in and of itself establishes discrimination. But we have been unable to find any evidence which shows in the slightest particular that the treatment accorded Clay (Ali) by any board or member thereof was different from that given to any other registrant. Afforded every procedure known to the Act and the regulations, and an appeal to the Presidential Appeal Board to which he was not specifically entitled, appellant's refusal of induction and subsequent trial and conviction by a jury are the result of his own voluntary choice to violate the law of the land.

The contentions of appellant were given final and conclusive consideration by the highest tribunal within the

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service under this title . . . , and the determination of the President shall be final."

"There is no personal appearance before the President's Board, which makes a de novo classification based on the materials in the registrant's file." Comment, *The Selective Service*, 76 Yale L. J. 160, 172 (1966).

System, a board entirely independent of the Director of Selective Service, and the decision was the same—that appellant be classified 1-A, thereby making him available for induction into the armed forces. The action of the Presidential Appeal Board, a board in which there was no racial imbalance, and the subsequent refusal of appellant to be inducted, are, without more, sufficient to affirm the conviction.

II.

Denial of Appellant's Request for Production of Certain Documentary and Other Evidence

Prior to trial appellant sought discovery of certain evidence in connection with his allegation of systematic exclusion of Negroes from the System and racial discrimination against him. He moved the Court under Rule 16, Federal Rules of Criminal Procedure, that the Government produce all records of the National Advisory Commission on Selective Service showing the composition of draft boards in Texas and Kentucky and the details of the number of Negroes and whites classified for service and exempt or deferred from induction, other records of the Mark Clark Commission on Selective Service to the House Armed Forces Committeee, all of the files of Local Board No. 47, Louisville, Kentucky, relating to registrants who claimed and were granted exemptions, minutes of the meetings of the Presidential Appeal Board and Texas Appeal Board, the entire draft board file of appellant, and the White House transcript of a press conference by the President on March 9, 1967. He also moved to take the oral depositions of Lieutenant General Lewis B. Hershey, the National Director of Selective Service, Washington;

United States Representative L. Mendell Rivers, Chairman, House Armed Services Committee, Washington; the members of the National Selective Service Appeal Board and the members of the Texas Appeal Board. General Hershey was requested to bring with him his notes about a public statement on January 31, 1967, in which he predicted appellant would not be deferred. Representative Rivers was requested to bring the notes of his public statement on August 25, 1966, relative to a statement that if Cassius Clay was deferred by the Louisville Board, "You watch what happens in Washington." The members of the National Selective Service Appeal Board were to bring all records and to be examined about the minutes of meetings and communications between them relating to appellant's hearing. The same information was to be obtained from the members of the Texas Appeal Board. Appellant also moved to take the depositions by written interrogatories of the Governors of Texas and Kentucky, the Selective Service Directors of those states, General Hershey, members of the National Selective Service Appeal Board, members of Local Board No. 47, members of the Texas Appeal Board and Representative Rivers. Another application sought issuance of subpoenas duces tecum to Lyndon B. Johnson, President of the United States;[9] Ramsey Clark, Attorney General; General Hershey; the Chairman of Local Board No. 47, Louisville, Kentucky; the Chairman of Texas Appeal Board; the Director of the National Selective Service Appeal Board, Representative Rivers and the Executive Director of the National Advisory Commission on Selective Service, whereby these witnesses were to produce

[9] The request for a subpoena to the President was subsequently withdrawn by appellant's counsel.

certain books, papers and documents in their possession called for by the subpoenas.

A mass of material was, therefore, sought by these discovery techniques. The Trial Judge held a hearing, received briefs and permitted oral argument as to whether the requested discovery should be granted. Appellant's basic contention was that the information sought was necessary to prove systematic exclusion of Negroes in the Selective Service System and that there was lack of procedural due process in the handling of his case. The Government objected to the requested discovery and moved to quash the subpoenas duces tecum, contending that what appellant sought was to put the Selective Service System itself on trial by a congressional-type general investigation. The Government argued against permitting such an investigation of the System, and also that the material sought was irrelevant to any issue which might arise in the criminal trial.

The Government further contended that defense counsel was attempting to explore into the minds and mental processes of the administrative officers named in the subpoenas, was engaging in a "fishing expedition," and that much of the matter sought, though irrelevant, could be obtained from other sources. The District Court refused to order production of the discovery, documentary and other evidence sought by appellant. Nevertheless, much of it found its way into the record at the trial.[10] The measure

[10] In the present record are the following: Registrant's entire Selective Service file, the Report of the National Advisory Commission on Selective Service showing the percentages of Negroes on local boards throughout the states of the nation, Minutes of the Presidential Appeal Board relating to appellant's case, and the President's Message to the Congress on Selective Service dated March 6, 1967.

of discovery permitted by the Rules of Criminal Procedure is not intended to be as broad as in a civil case. Fishing expeditions are the order of the day in a civil action but not in a criminal case for in the latter only limited discovery is permitted. *United States* v. *Sermon*, D. C., W. D. Mo., 1963, 218 F. Supp. 871, 872, 873. A judge should, therefore, be sensitive to the rules of discovery, which are far more restrictive governing criminal discovery. *Campbell* v. *Eastland*, 5 Cir., 1962, 307 F. 2d 478, 487. Application for relief under Rule 16, Federal Rules of Criminal Procedure, is a matter within the sound discretion of the Court and the controlling test is whether there has been an abuse of discretion. *Gevinson* v. *United States*, 5 Cir., 1966, 358 F. 2d 761, 766; *Beatty* v. *United States*, 5 Cir., 1967, 377 F. 2d 181, 185, reversed on other grounds, 389 U. S. 45, 88 S. Ct. 234 (1967). We believe the District Judge's ruling was correct and that it was made in the exercise of reasonable discretion in the management of the proceeding. What the defense actually sought was to place the Selective Service System itself on trial by a broad, general, though vague and indefinite, investigation into its activities and procedures. Most of the evidence requested was immaterial to any defense which could be raised by appellant at his trial. The statistical information about the representation of Negroes on draft boards generally as well as in Kentucky and Texas was available from other sources and is in the record. It would have been grossly improper to place the members of the Presidential Appeal Board and the Texas Appeal Board on the witness stand to determine from them what their reasons were for the selective service classification which they gave to appellant in this case. There was, therefore, no error in the ruling of the Trial Judge.

III.

Denial of the Ministerial Exemption

Scope of Review. In considering the propriety of appellant's classification, and the denial of a ministerial exemption and conscientious objector status, we must keep in mind that the Act provides that decisions of the local boards are final. (50 U.S.C. App. § 460(b)(3). In the leading and much cited case of *Estep* v. *United States*, 327 U. S. 114, 122, 66 S. Ct. 423, 427 (1946), the Supreme Court said:

> "The provision making the decisions of the local boards 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant."

Therefore, the scope of review of local board decisions in draft cases is very limited and the range of review is the narrowest known to the law. *Matyastik* v. *United States*, 5 Cir., 1968, 392 F. 2d 657 [No. 24269, February 12, 1968]; *Blalock* v. *United States*, 4 Cir., 1957, 247 F. 2d 615.[11] In *Blalock* the Fourth Circuit said:

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[11] "The registrant who wants to take his case to court will find little relief from that quarter. Indeed, he will find it difficult to obtain review at all. The courts have allowed review only by

"The 'clearly erroneous' rule applied in equity appeals has no place here, nor even the 'substantial evidence' rule of the Administrative Procedure Act, 5 U.S.C.A. § 1009. Congress gave the courts no general authority of revision over draft board proceedings, and we have authority to reverse only if there is a denial of basic procedural fairness or if the conclusion of the board is without any basis in fact. Witmer v. United States, 348 U. S. 375, 75 S. Ct. 392, 99 L. Ed. 428; Goff v. U. S., 4 Cir., 135 F. 2d 610."

The courts do not sit as super draft boards, substituting their judgments on the weight of the evidence, nor should they look for substantial evidence to support such determinations. *Tamarkin* v. *United States*, 5 Cir., 1958, 260 F. 2d 436, 437; *Wood* v. *United States*, 5 Cir., 1967, 373 F. 2d 894, reversed on other grounds, 389 U. S. 20, 88 S. Ct. 3 (1967); *Dickinson* v. *United States*, 346 U. S. 389, 396, 74 S. Ct. 152, 157 (1953); *Witmer* v. *United States*, 348 U. S. 375, 75 S. Ct. 392 (1955).

In recent cases we have consistently supported the "basis in fact" test in connection with the classification of draft registrants by local boards. See *Wood* v. *United States*, 5 Cir., 1967, 373 F. 2d 894, reversed on other grounds, 389 U. S. 20, 88 S. Ct. 3 (1967); *Greer* v. *United States*, 5 Cir., 1967, 378 F. 2d 931; *Foster* v. *United States*, 5 Cir., 1967, 384 F. 2d 372; *Jones* v. *United States*, 5 Cir., 1968, 387 F. 2d 909 [No. 24565, January 17, 1968]; *Matyastik* v.

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habeas corpus after induction and defense to a criminal prosecution for failure to report for induction." (citing *Witmer* v. *United States*, 348 U. S. 375, 377, 75 S. Ct. 392 (1955) in support of the text) Comment, *The Selective Service*, 76 Yale L. J. 160, 172 (1966).

United States, 5 Cir., 1968, 392 F. 2d 657 [No. 24269, February 12, 1968].[12]

The Ministerial Exemption. We turn now to the question of the denial of a ministerial exemption to appellant who claims to be a minister of the Lost Found Nation of Islam (Black Muslims). The Act provides that regular or duly ordained ministers of religion shall be exempt from service. (50 U.S.C. App. § 456(g).)

> "The term 'regular minister of religion' means one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister." (50 U.S.C. App. § 466(g), (2).)

See also 32 C.F.R. § 1622.43 (Selective Service Regulations) which places a regular minister of religion in Class IV-D. Most important, the registrant bears the burden of clearly establishing a right to the ministerial exemption and the board has no affirmative duty to ascertain whether or not the registrant qualifies for the exemption. *Wood* v. *United States*, 5 Cir., 1967, 373 F. 2d 894, reversed on other grounds, 389 U. S. 20, 88 S. Ct. 3 (1967).

In *Dickinson* v. *United States*, 346 U. S. 389, 394, 395, 74 S. Ct. 152, 156, 157 (1953), a ministerial exemption case, the Supreme Court said:

> "The ministerial exemption, as was pointed out in the Senate Report accompanying the 1948 Act, 'is a narrow

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[12] For a further discussion of the narrow scope of review in draft cases, see Comment, *Fairness and Due Process Under the Selective Service System*, 114 Penna. L. Rev. 1015, 1019 (1966).

one, intended for the leaders of the various religious faiths and not for the members generally.' S. Rep. No. 1268, 80th Cong., 2d Sess. 13. Certainly all members of a religious organization or sect are not entitled to the exemption by reason of their membership, even though in their belief each is a minister. Cf. Cox v. United States, 1947, 332 U. S. 442, 68 S. Ct. 115, 92 L. Ed. 59. On the other hand, a legitimate minister cannot be, for the purposes of the Act, unfrocked simply because all the members of his sect base an exemption claim on the dogma of its faith. That would leave a congregation without a cleric. Each registrant must satisfy the Act's rigid criteria for the exemption. Preaching and teaching the principles of one's sect, if performed part-time or half-time, occasionally or irregularly, are insufficient to bring a registrant under § 6 (g). These activities must be regularly performed. They must, as the statute reads, comprise the registrant's 'vocation.' And since the ministerial exemption is a matter of legislative grace, the selective service registrant bears the burden of clearly establishing a right to the exemption."

The test, therefore, is whether a registrant, as a vocation, regularly, not occasionally, teaches and preaches the principles of his religion. There must be regularity of religious activities, a ministerial vocation rather than an avocation, and a recognized standing as a minister to a congregation or leader of a group of lesser members of his faith. *Wiggins* v. *United States*, 5 Cir., 1958, 261 F. 2d 113; *Fitts* v. *United States*, 5 Cir., 1964, 334 F. 2d 416; *Wood* v. *United States*, 5 Cir., 1967, 373 F. 2d 894, reversed on other grounds, 389 U. S. 20, 88 S. Ct. 3 (1967); *Greer* v.

United States, 5 Cir., 1967, 378 F. 2d 931; *Foster* v. *United States*, 5 Cir., 1967, 384 F. 2d 372; *Jones* v. *United States*, 5 Cir., 1968, 387 F. 2d 909 [24565, January 17, 1968]; *Matyastik* v. *United States*, 5 Cir., 1968, 392 F. 2d 657 [No. 24269, February 12, 1968].

Appellant was certified as a minister by the National Secretary of the Lost Found Nation of Islam and by its leader, Elijah Muhammad. He contends that he spends 90% of his time on his ministerial duties. He submitted 43 affidavits and documents said to contain the signatures of 3,612 people testifying to his ministerial activities. Finally he states that there was no evidence in his file upon which a "basis in fact" could be found to support his 1-A classification by the board. We are unable to agree with his statements or contentions. The file indicates that appellant joined his religious sect in January 1964. He has apparently earned his living as a professional boxer for a number of years and became professional heavyweight boxing champion of the world on February 25, 1964. Some years earlier he had won the world light heavyweight boxing championship at the Olympics at Rome. He contends that he became a minister of the Muslims in early 1964. In the first information which he supplied to his local board on selective service forms, his occupation was shown to be that of "professional boxer" and "professional prizefighter." The Report of Medical History dated January 24, 1964 showed his usual occupation to be "boxing." During all this time he made numerous trips to foreign countries to engage in professional bouts which he stated required daily physical training and exercise in preparation for these prizefights. His Current Information Questionnaire dated February 2, 1966 listed his occupation as a "professional boxer" and his work as "professional fighting." Then,

on February 17, 1966, the eventful and important date in this case, his 1-Y classification was changed by the local board to 1-A. Clay (Ali) had never stated to his board or claimed to be a minister or a conscientious objector prior to that time. He wrote Local Board No. 47 on February 14, 1966, just three days prior to his reclassification that "My occupation is professional boxer, and I am at present the Heavyweight Champion of the World." Even when he filled out the Special Form for Conscientious Objector dated February 28, 1966, though claiming to be a member of the Nation of Islam, he did not claim to be a minister. His letter of March 17, 1966 to Local Board No. 47 protested that his reclassification imposed "grave hardship upon me as heavyweight champion of the world at now age 24." When he appeared in person before Local Board No. 47 on March 19, 1966, boxing was listed as his livelihood. The evidence which the local board had before it was much more than necessary to constitute a "basis in fact" for his 1-A classification and denial of the ministerial exemption. His vocation is clearly that of a professional boxer.

IV.

Denial of Conscientious Objector Status

Appellant's claim that he is a conscientious objector began on February 18, 1966, one day after his reclassification to 1-A, at which time he was furnished the Special Form for Conscientious Objector. He was granted a personal appearance before Local Board No. 47 on March 19, 1966, pursuant to his request. The board's record of that appearance reflects that he claimed hardship on account of taking care of his parents and paying alimony to his former wife. The board's record states, "His religion teaches them not

to take part in any way with infidels or any nonreligious group. They fight only in self-defense, not war. Boxing is considered his livelihood." Also, "Clay objects to being in service because he has no quarrel with the Viet Cong. Clay stated that he could not, without being a hypocrit, [sic] take part in anything such as war or anything that is against the Moslim religion." He wrote a lengthy letter to his local board dated April 16, 1966, in which he repeated his hardship request as the sole support of his mother and on account of having to pay alimony to his first wife. He protested that two years of military service would cause him serious financial loss in being unable to pursue his livelihood as a professional boxer.[13] The local board nevertheless reaffirmed the 1-A classification and the registrant appealed to the appeal board. On May 6, 1966, the complete file was reviewed by the Kentucky Board of Appeals which tentatively determined that the registrant should not be classified in Class 1-O (conscientious objector) or in a lower class. See 32 C.F.R. § 1626.25(a), (b).

The Department of Justice then requested a Federal Bureau of Investigation investigation and a special hear-

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[13] The pertinent part of the letter to the board reads as follows:

"Two years is a very long time in the life of a heavyweight champ—from age 22 when I was classified from 1-A to 1-Y, and my present age 24. From age 24—to age 26 I may never be able to overcome this time of loss of boxing sharpness and come back from the service and earn the kind of money required to pay off these financial obligations, even though they may be abated during the time of military service. I would therefore be in hock for the rest of my life, whereas if I can get in a few more fights, which are lined up through the fall of this year, I should be able to settle these permanent financial obligations from the money I should get within this year, while I am at my peak of shape and am the Heavyweight Champion of the World. A 6-month defense is necessary to retain the title."

ing on the character and good faith of the conscientious objections of the registrant. (32 C.F.R. § 1626.25(d).)[14] The special hearing was held on August 23, 1966, at Louisville, Kentucky, before former Circuit Judge Lawrence Grauman as hearing officer. The hearing officer reported to the Department of Justice that the registrant stated his views in a convincing manner, answered all questions forthrightly, that he was impressed by the statements, believed the registrant was of good character, morals and integrity and sincere in his objection on religious grounds to participation in war in any form. He recommended that his conscientious objector claim be sustained. However, the Department of Justice in a detailed and comprehensive letter opposed his claim[15] and recommended to the Kentucky Board of Appeals that it not be sustained. The Department of Justice concluded that registrant's objections to participation in war insofar as they are based upon the teachings of the Nation of Islam "rest on grounds which are primarily political and racial. These constitute objections to only certain types of war in certain circumstances, rather than a general scruple against participation in war in any form."[16] The Department of Justice pointed out

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[14] The regulations follow generally the provisions of the Act on the procedure for considering conscientious objections. See 50 U.S.C. App. § 456(j).

[15] The Department's written objections are to be found in the file in a 17-page letter dated November 25, 1966 to the Chairman of the Appeal Board, Western District of Kentucky.

[16] For a penetrating analysis of the beliefs of the Black Muslims, see *Sostre* v. *McGinnes*, 2 Cir., 1964, 334 F. 2d 906, cert. denied, 379 U. S. 892, 85 S. Ct. 168 (1964). The Court said in that case (at 909):

> "Basic to the problem of prison discipline is the fact that the teachings of Elijah Muhammad include condemnation of the entire white race as wholly 'evil,' composed of devils, mur-

that only a general scruple against participation in war in any form can support a claim for conscientious objector

derers, thieves, robbers, scientists at tricks, world snoopers, meddlers and liars.[4] Presenting almost equal difficulty is the Muslims' demand for total segregation between whites and blacks. These Muslims also adopt the position that the Christian religion is loathsome and despicable.[5]

"[4] Elijah Muhammad has said:

"'The white race or Caucasian European race is known to God and his prophets as Satan, the devil, the enemy of God and his people (the original nation) power was given to them to rule with evil and falsehood the darker nations for six thousand years. They have done and are now forty-six years overtime and they know this. It will take a few years to complete the separation. Nevertheless the work is going on now at a very good rate of speed.'

"'The truth of the white race will make all black mankind hate them. The truth of the white race and kind will make all black mankind hate them regardless of their color; black, brown, yellow or red. The truth of the white race is a part of that secret which was withheld by Allah to allow them, the devils, to live their time, six thousand years.'

"'If you understood it right you will agree with me that the whole Caucasian Race is a race of devils.'

"(The quotations are from the Supreme Wisdom containing 'the teachings' of the Honorable Elijah Muhammad. This work work was an exhibit in the present case.)

"Malcolm X, at the time a 'minister' of the Muslims, said of an airplane accident in which more than 120 white people were killed:

"'Well, somebody came and told me that he really had answered our prayers over in France. He dropped an airplane out of the sky with over one hundred twenty white people on it, because the Muslims believe in an eye for an eye and a tooth for a tooth, but thanks to God or Jehovah or Allah we will continue to pray and we hope that every day another plane falls out of the sky.'

"[5] 'Bratcher said in the presence of white officers and white inmates, to another colored inmate, "This goddam Jesus Christ has got to go. He has served the purpose of the white man long enough."' (Testimony of A. J. Meyer.)"

status, citing *United States* v. *Kauten*, 2 Cir., 1943, 133 F. 2d 703.[17] The Department of Justice said that the registrant had not consistently manifested his conscientious objector claim and had not shown overt manifestations sufficient to establish his subjective belief where his claim was not asserted until military service became imminent, not having been made at all prior to being reclassified 1-A in February 1966, and cited in support thereof *Campbell* v. *United States*, 4 Cir., 1955, 221 F. 2d 454, and *United States* v. *Corliss*, 2 Cir., 1960, 280 F. 2d 808, cert. denied, 364 U. S. 884, 81 S. Ct. 167 (1960). Numerous statements by the registrant made from time to time were quoted by the Department of Justice in justification of its recommendation against the registrant's conscientious objector claim.[18]

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[17] The Department of Justice's letter said in part: "It seems clear that the teachings of the Nation of Islam preclude fighting for the United States not because of objections to participation in war in any form but rather because of political and racial objections to policies of the United States as interpreted by Elijah Muhammad." (Letter p. 10.)

[18] The special hearing officer quoted the following passage from the registrant's letter to the local board dated February 14, 1966:

"'3. That I am a devoit Muslim and a follower of Islamic religious faith under the discipline of the prophet Elijah Muhammad. To bear arms or kill is against my religion and I conscientiously object to any combat military service that involves the participation in any war in which the lives of human beings is taken. This I do not believe to be rightous. This has been my faith upward of five years.' [sic]"

The Department of Justice's letter recommendation said:

"It should be noted that while the resume statement of the attorney for the sponsoring group did, as noted by the Hearing Officer, express the opinion that registrant sincerely believes that he is conscientiously opposed to military service, the resume also reflects that the attorney believed that registrant would be sincere in his claim as a conscientious objector 'to the extent that registrant can be sincere in a belief'.

The registrant was furnished with a copy of the adverse recommendation of the Department of Justice. The Ken-

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> The resume further reflects that the attorney 'could not be sure how deep any human conviction goes with the registrant' and that he is "not certain as to what motivates the registrant in this respect.' (Resume, page 5) The attorney added that in view of his past experiences with the registrant changing his mind, he would not be surprised 'if a year from now the registrant becomes disenchanted with the Muslims and voluntarily joins the United States Marines.' The member of the sponsoring group, it should also be noted, stated that 'I'll go to my grave believing registrant basically is a good boy and was brainwashed first by his father and then by the Muslims.' (Resume, page 7)."

At the special hearing, in response to a question of the hearing officer, the registrant stated, "If the Honorable Elijah Muhammad looked me in my face and he who I believe is directly from Allah, Almighty God Allah, and if he looked at me and advised me, which I'm sure he wouldn't, to fight in any kind of war, if he advised me to I would." Then the registrant testified:

> "Sir, I said earlier and I'd like to again, to make that plain, that it would be no trouble for me to accept conscientious objector on the basis that I'll go into the Armed Services boxing exhibitions in Viet Nam, or traveling the country at the expense of the Government or living in the easy life and not having to get out in the mud and fight and shoot and if this — — if I could do this, or if it was something I wanted to do, or was in my heart to do if it wasn't against my conscience to do it, I would easily do it. I wouldn't raise all this court stuff and I wouldn't go through all of this and lose and give up the millions that I gave up and my image with the American public that I would say is completely dead and ruined because of us in here now, and so I wouldn't turn down so many millions and jeopardize my life walking the streets of the South and all of America with no bodyguard if I wasn't sincere in every bit of what the Holy Qur'an and the teachings of the Honorable Elijah Muhammad tell us and it is that we are not to participate in wars on the side of nobody who—on the side of non-believers, and this is a Christian country and this is not a Muslim country, and the Government and the history and the facts shows that every move toward the Honorable Elijah Muhammad is made to

tucky Appeal Board thereafter reaffirmed the 1-A classification.

Whether the registrant's beliefs are "truly held" is the threshold question of sincerity which must be resolved by the board. *United States* v. *Seeger*, 380 U. S. 163, 185, 85 S. Ct. 850, 863 (1965).[19] The "basis in fact" test applied to

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distort and is made to ridicule him and is made to condemn him and the Government has admitted that the police of Los Angeles were wrong about attacking and killing our brothers and sisters and they were wrong in Newark, New Jersey, and they were wrong in Louisiana, and the outright, everyday oppressors and enemies are the people as a whole, the whites of this nation. So, we are not, according to the Holy Qur'an, to even as much as aid in passing a cup of water to the—even a wounded. I mean, this is in the Holy Qur'an, and as I said earlier, this is not me talking to get the draft board—or to dodge nothing. This is there before I was borned and it will be there when I'm dead and we believe in not only that part of it, but all of it."

The registrant affirmed at the hearing that he was correctly quoted by the *Chicago Daily News* on February 18, 1966, the day after his reclassification to 1-A, as follows:

"I am a member of the Muslims and we don't go to no war unless they are declared by Ali himself. I don't have no personal quarrel with those Vietcongs.

* * * *

"Let me tell you, we Muslims are taught to defend ourselves when we are attacked. Those Vietcong are not attacking me. These Vietcong are fighting a very nasty war over there. There is a lot of people getting killed. Why should we Muslims get involved? Besides, I am fighting for the government every day. I am laying my life on the line for the government. Nine out of ten soldiers would not want to be in my place in the ring. It is too dangerous."

[19] The Third Circuit recently rejected the claim of a Roman Catholic for conscientious objector classification who said he would fight only in a "just war" and that denial of such classification would violate his federally protected right to religious freedom and equal protection of the law. *United States* v. *Spiro*, 3 Cir., 1967, 384 F. 2d 159, cert. denied, 390 U. S. 956, 88 S. Ct. 1028 (1968).

the conscientious objector claim of registrant was fully met in this case. There was more than adequate evidence to justify the rejection of his claim.

V.

The Bill of Attainder

The Constitution prohibits the passing of a bill of attained by Congress, Art. I, § 9, Cl. 3, and a bill of attainder is said to be a legislative act which inflicts punishment without a judicial trial. *Cummings* v. *The State of Missouri*, 71 U. S. (4 Wall.) 277 (1867). As interpreted by the Supreme Court, this clause prohibits all legislative acts "no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial. . . ." *United States* v. *Lovett*, 328 U. S. 303, 315, 66 S. Ct. 1073, 1078 (1946). Accordingly, appellant contends that the whole proceeding of his classification and induction into the military service constituted a prohibited bill of attainder. The only issue submitted to the jury at his trial was whether he refused to take the step forward at the induction ceremony. Appellant contends in brief that "Every important factual adjudication was extra judicially made by administrative bodies operating under the Act." Since the draft board's authority flows from congressional enactment, appellant argues that Congress has subjected him to a non-judicially imposed penalty in a non-judicial forum. He maintains that he was classified without a judicial trial.

So far as the trial proceedings before the District Court are concerned, there was no irregularity or failure to provide due process of law. The District Judge informed

the jury that he had examined the defendant's Selective Service File and found, as a matter of law, that there was a basis in fact for the 1-A classification given the registrant. The jury was instructed that it was not to consider the question of whether or not the defendant was entitled to this classification for this determination was not for the jury. This ruling and instruction was in exact conformity with the Supreme Court's teaching in *Cox* v. *United States*, 332 U. S. 442, 452, 453, 68 S. Ct. 115, 120 (1947), where the Court said:

> "Whether there was 'no basis in fact' for the classification is not a question to be determined by the jury on an independent consideration of the evidence. The concept of a jury passing independently on an issue previously determined by an administrative body or reviewing the action of an administrative body is contrary to settled federal administrative practice; the constitutional right to jury trial does not include the right to have a jury pass on the validity of an administrative order."

Proceedings before local and appeal boards are informal and are stripped of the panoply of formal judicial tribunals. *United States* v. *Pitt*, 3 Cir., 1944, 144 F. 2d 169, 172. Such proceedings are non-judicial in nature and are clearly non-criminal, for appellant was neither a suspect nor an accused and he was appearing before the boards which were giving him a hearing only in an administrative proceeding. *United States* v. *Sturgis*, 3 Cir., 1965, 342 F. 2d 328, 332. It is true that appellant sought a judicial determination of his case prior to induction, and the decision was adverse in every tribunal to which he presented this issue. The Sixth Circuit, in declining to grant him an

injunction pending his appeal from the decision of the Kentucky Federal District Court, said:

> "We do not believe that Congress ever intended that draftees should have the right to litigate the validity of their induction before acceptance for National Service. If injunction suits were permitted, interminable delays would undoubtedly result while the cases were being processed in the Courts. Such a procedure would interfere with the orderly proceedings of the draft boards and prevent them from filling their quotas and supplying the armed forces with much needed personnel." *Muhammad Ali* v. *Breathitt*, 6 Cir., April 17, 1967, Docket No. 17834, unpublished.

Similar relief was also denied by the Fifth Circuit by its numerous orders to which we have previously referred.

The most recent amendment to the draft law (now called the Military Selective Service Act of 1967) permits judicial review only "as a defense to a criminal prosecution instituted . . . after the registrant has responded either affirmatively or negatively to an order to report for induction." [20] The amendment was undoubtedly Congress' answer to the holding in *Wolff* v. *Selective Service Local Board No. 16*,

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[20] 50 U.S.C. App. § 460(b)(3), as amended in 1967, reads as follows:

> "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided*, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant."

2 Cir., 1967, 372 F. 2d 817, in which the Second Circuit upheld preinduction judicial review [21] of a selective service classification which allegedly infringed upon the constitutional right to free speech. That case involved the reclassification of deferred students, making them available for military duty because of participation in Viet Nam. Preinduction consideration was afforded petitioners on the narrow constitutional ground that the reclassification would have a continued chilling effect, *Dombrowski* v. *Pfister*, 380 U. S. 479, 85 S. Ct. 1116 (1965), on them by being subjected to the added sanction of induction. It is clear by the 1967 amendment to the Act that Congress intends there be no preinduction judicial proceedings which would interfere with the orderly drafting of needed manpower for the armed forces. *DuVernay* v. *United States*, 5 Cir., 1968, 394 F. 2d 979 [No. 24132, February 7, 1968]. Judicial review prior to induction, even on constitutional grounds, is an open invitation to a large volume of litigation, much of which we could expect would undoubtedly be based on frivolous grounds in an attempt to delay or evade military service. As the Supreme Court said in *Falbo* v. *United States*, 320 U. S. 549, 554, 64 S. Ct. 346, 349 (1944):

> "The circumstances under which the Act was adopted lend no support to a view which would allow litigious

[21] "While there was no serious question that eventually petitioners would be able to secure review, *Wolff* is the first case allowing direct judicial review of a registrant's classification prior to induction. It had been held almost without exception that aggrieved registrants could not challenge the determination of their local boards in the courts except by either submitting to induction and seeking habeas corpus relief, or by refusing induction and securing review by way of a defense to a criminal prosecution." Comment, 81 Harv. L. Rev. 685, 686 (1968).
The Government did not file a petition for certiorari in the *Wolff* case.

interruption of the process of selection which Congress created. To meet the need which it felt for mobilizing national manpower in the shortest practicable period, Congress established a machinery which it deemed efficient for inducting great numbers of men into the armed forces. Careful provisions were made for fair administration of the Act's policies within the framework of the selective service process. But Congress apparently regarded 'a prompt and unhesitating obedience to orders' issued in that process 'indispensable to the complete attainment of the object' of national defense. Martin v. Mott, 12 Wheat. 19, 30, 25 U. S. 19, 30, 6 L. Ed. 537. Surely if Congress had intended to authorize interference with that process by intermediate challenges of orders to report, it would have said so."

The registrant's remedy is in defense to a criminal prosecution if he declines induction, and habeas corpus if he accepts induction but is still aggrieved by the classification process. *Witmer* v. *United States*, 348 U. S. 375, 377, 75 S. Ct. 392, 394 (1955).[22]

In the present matter the registrant fully exhausted all administrative remedies available to him. In that re-

[22] In *Schwartz* v. *Strauss*, 1953, 206 F. 2d 767, the Second Circuit affirmed on the opinion below (114 F. Supp. 438) the District Court's denial of relief to a plaintiff who sought a preinduction declaratory judgment and an injunction "claiming that his selective service classification is erroneous as a matter of law and that he is thereby deprived of certain constitutional rights." The District Court said "that there are many authorities that do not permit judicial review before induction" and that "the Congressional intent was to keep the administrative process of the Selective Service System free from the delays and disruption incident to court interference prior to induction." The Court said that "plaintiff's remedy is by way of habeas corpus after induction or by refusing to be inducted after the administrative process is complete." 114 F. Supp. at 439.

spect the case differs from *DuVernay v. United States*, 5 Cir., 1968, 394 F. 2d 979 [No. 24132, February 7, 1968], where we affirmed the conviction of *DuVernay* because of his failure to exhaust administrative remedies. We also pointed out in footnote 6 of that case (394 F. 2d 983) that as to the attack on the racial composition of the local board, since draft board members are public officers appointed by the President, a challenge to the composition of the board indirectly challenges the qualifications of the present members and their eligibility to perform their duties. We said that the public officers' authority was not subject to collateral attack in the criminal proceeding but must be challenged by direct attack. *DuVernay's* conviction, however, was not affirmed on that issue but on the failure of the draftee to exhaust administrative remedies. While it is true that qualifications of a public officer generally may not be collaterally attacked, the charge of systematic exclusion of Negroes from draft boards in this case, where all administrative remedies have been exhausted, is of constitutional proportions and warrants our consideration and disposition of that issue. We do not view appellant's contention here as requiring the removal of draft board members because of so-called systematic exclusion of racial imbalance, but that appellant seeks to have their acts declared invalid as to him. It is apparent that the systematic exclusion contention must, therefore, be decided. Accordingly, we have given full consideration to that contention, now urged in this criminal proceeding, though we believe it is not applicable insofar as draft board membership is concerned, and, at the least, that the acts of such boards are de facto valid and binding. *United States v. Commonwealth of Pennsylvania*, D. C., W. D. Penna., 1963, 214 F. Supp. 913;

United States v. Lindsley, 7 Cir., 1945, 148 F. 2d 22, cert. denied, 325 U. S. 858, 65 S. Ct. 1195 (1945). There is no question involved here of the board acting beyond its jurisdiction in classifying and attempting to induct appellant who, under the Act and regulations, is clearly a proper subject for military service in the armed forces of the United States. Since under the Act and the settled law the systematic exclusion contention may not properly be raised prior to induction, we have concluded that it is reasonable, all administrative and other remedies having been exhausted by appellant, that we meet the issue squarely and resolve it, which we have done.[23]

There is no merit to the bill of attainder argument as we have seen.

The conviction and sentence are, therefore, AFFIRMED.

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[23] Appellant raised another issue which is without merit. He claimed deprivation of due process because of the inclusion in his Selective Service File of numerous letters and newspaper clippings alleged to be prejudicial, and also because of pre-final classification statements of General Hershey, the National Director, and Congressman Rivers, Chairman of the House Armed Services Committee. We have heretofore described the statements of General Hershey and Congressman Rivers in Chapter II of this opinion. The record shows quite clearly that it is the practice of local boards to place all correspondence relating to a registrant in his file. A number of letters and clippings from members of the general public protesting the delay in inducting appellant were received by the board and filed. The record is devoid of any indication that these letters and clippings played any part whatsoever in the ultimate classification of appellant. That is also true of the statements of the General and Congressman. As to General Hershey's statement, we have already shown that board is independent of the National Director as provided in 32 C.F.R. § 1604.6(a), (b), (c), and it was General Hershey who caused an appeal of registrant's case to the Presidential Appeal Board. Obviously it is the right of Congressman to express opinions on matters of public interest, including registrant's draft case. But nothing in the record of this case shows that Congressman Rivers' statement had any effect on the classification of appellant.

Order Denying Petition for Rehearing and Petition for Rehearing *En Banc*

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 24991

CASSIUS MARSELLUS CLAY, JR.,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(June 6, 1968)

Before COLEMAN, AINSWORTH and DYER, *Circuit Judges.*

PER CURIAM:

The Petition for Rehearing is Denied and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 25(a), subpar. (b), the Petition for Rehearing En Banc is Denied.

Order of United States Supreme Court

SUPREME COURT OF THE UNITED STATES

No. 271, October Term, 1968

Cassius Marsellus Clay, Jr., also known as Muhammad Ali,

Petitioner,

v.

United States.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

This Cause came on to be heard on the transcript of the record from the United States Court of Appeals for the Fifth Circuit.

On Consideration Whereof, it is ordered and adjudged by this Court that the judgment of the said United States Court of Appeals in this cause be, and the same is hereby, vacated; and that this cause be and the same is hereby, remanded to the United States District Court for the Southern District of Texas for further proceedings in conformity with the opinion of this Court.

March 24, 1969

[Clerk's certificates omitted.]

Second Opinion of the Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 28252

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CASSIUS MARSELLUS CLAY, JR.,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

(July 6, 1970)

Before WISDOM, AINSWORTH and CLARK, *Circuit Judges.*

AINSWORTH, *Circuit Judge:* This Selective Service case involves the conviction by a jury on June 20, 1967 of Cassius Marsellus Clay, Jr., also known as Muhammad Ali, former professional heavyweight boxing champion of the world, for wilfully refusing to be inducted into the armed Forces of the United States, in violation of 50 U.S.C. App. § 462, and is before us for the second time.[1] We affirmed the conviction on May 6, 1968, and rehearing en banc was

[1] Defendant's request that this case, now on its second time before the Court, be heard en banc was denied on February 10, 1970.

denied June 6, 1968. See *Clay* v. *United States*, 5 Cir., 1968, 397 F.2d 901.

The defendant then petitioned the Supreme Court for certiorari, and while the petition was pending before that Court, the Government revealed that there had been five telephone conversations participated in by defendant which were overheard by the Federal Bureau of Investigation by electronic wiretapping. Accordingly, the Supreme Court granted certiorari, *sub nom. Giordano* v. *United States*, 394 U. S. 310, 89 S. Ct. 1163 (1969), and remanded this case to the District Court for further proceedings in conformity with *Alderman* v. *United States*, 394 U. S. 165, 89 S. Ct. 961 (1969), to determine whether the conviction was affected by the wiretaps.

Pursuant to the Supreme Court's grant of certiorari, a lengthy hearing was then held before District Judge Joe Ingraham on June 2, 4, 5, and 6, 1969, in Houston, Texas, at which time the Court considered the FBI logs of the five wiretapped telephone conversations delivered to it in advance of the hearing by the Government. The Court then ordered that the logs of wiretapped conversations 1, 2, 3, and 4 be received in evidence and their contents fully disclosed to the defendant. As to these four logs of wiretapped telephone conversations, the Court held that the defendant had standing to assert the illegality of the surveillance and that the illegality was not challenged by the Government. The fifth log of a wiretapped conversation in which defendant participated was considered in camera by the District Judge, with related exhibits, and held to be a lawful surveillance by the FBI pursuant to the Attorney General's authorization of a wiretap for the purpose of gathering foreign intelligence.

The District Court concluded that the first four logs did not bear on the issues involved in defendant's conviction;

that the defendant failed to show any relevancy of these logs to the conviction; and that the conviction must stand. The fifth wiretapped conversation which related to the gathering of foreign intelligence was held to be lawful surveillance, reasonable and necessary to the protection of the national interest.

As we have stated, logs 1, 2, 3, and 4 were made available to defendant to afford him an opportunity to show the relevance of any of these wiretapped conversations to his Selective Service law conviction. (The logs are all of the evidence which the FBI possesses of the wiretapped conversations, the tapes on which the conversations were originally recorded having been erased when the logs were typed.) The five telephone conversations were not tapped in an electronic surveillance of defendant Clay but were made in connection with surveillance of others, the defendant not having been the subject of the surveillance.

Log 1 pertained to a telephone conversation on April 22, 1965, when the telephone of Elijah Muhammad was tapped in Phoenix, Arizona. A person named Herbert called the defendant, Clay, asking him about his physical condition, prospective fights, and personal details relative to the family.[2]

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[2] Log 1 is reproduced in full as follows:

"Herbert called, via operator, to 305-635-8893 in Miami and asked to speak to Cassius Clay. Herbert told Clay he was here in Arizona and asked how Clay was. Clay said he was fine and was down to 213 pounds. Herbert told him not to overdo it. Herbert asked him if he was going to Boston soon and he said yes, about a week and a half. Herbert said he would be down there to see him fight with his brother. Clay told him to call two days before. Clay mentioned that one boy backed out. He asked Herbert how long he was going to be out here and Herbert said he might leave tomorrow. Herbert asked how everything else was and Clay said fine.

Log 2 referred to another wiretap of a telephone conversation of the telephone of Elijah Muhammad on March 24, 1964. Elijah called defendant Clay, telling him that he wanted to see him about making a minister out of him when "he quit thinking of fighting all the time" and that Clay would make a better minister than a fighter.[3]

Log 3 was another log of a wiretap of the Phoenix, Arizona, telephone of Elijah Muhammad of a telephone conversation on October 22, 1964, when a man believed to be John Ali talked to a person believed to be the defendant, Clay, giving him a message from Elijah about holding up "those TV people," who were apparently about to interview Clay.[4]

Herbert asked how his brothers were and Clay mentioned that James got put out of the temple for being out all night with women. Herbert said Clay knew what to do with a case like that, to get him a ticket and send him back where he came from. Herbert asked about . . . (probably his wife) and Clay said she had gone to Jackson with a lady friend. Herbert said he would probably call him tomorrow, to take it easy and if there was anything he could do to let him know. Clay mentioned something about having Herbert check his car when he, Herbert, got to Chicago. /Recorded/."

[3] Log 2 is reproduced in full as follows:

"Elijah took call from C. Clay. Elijah asked the time there and then said it was only 1 hr. faster than here. Elijah said he wanted to see Clay as he was going to make a minister out of him when he quite (sic) thinking of fighting all the time. Elijah said he would make a better minister than a fighter anyhow. Elijah then said he would contact him when he had time to talk to him. Elijah also told him to keep quiet."

[4] Log 3 is reproduced in full as follows:

"Man believed to be John Ali is heard dialing out on Albert's phone for a long distance call via direct dial. He then talks to person believed to be Muhammad Ali (Clay) and says he has just talked with the Messenger and the Messenger would like for him to hold up those TV people a while since they

Log 4 was taken on September 4, 1964, in Atlanta, in connection with surveillance of the telephone of Dr. Martin Luther King, Jr. MLK (ostensibly Dr. King) exchanged greetings with defendant Clay, wished him well on his recent marriage, and in turn was invited to attend defendant's next championship fight. Clay also told MLK to take care of himself, that he is known world wide, and admonished him that he "should watch out for them whities," etc.[5]

The Trial Judge held that "the logs are so totally innocuous that they could not have had any bearing on the defendant's conviction under any circumstances." The District Judge's reasons in this regard, ably expressed, with which we agree, are reproduced in pertinent part in the margin.[6]

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are going to be here Saturday and he will see what they want so that he (Elijah) will know what (Clay) is going to be asked to say. John mentions that he will probably be coming there when he leaves Phoenix and should be there for Saturday and Sunday. He then gives the Muslim closing."

[5] Log 4 is reproduced in full as follows:

"Chauncey to MLK, said he is in Miami with Cassius, MLK spoke to Cassius, they exchanged greetings, MLK wished him well on his recent marriage, C invited MLK to be his guest at his next championship fight, MLK said he would like to attend. C said that he is keeping up with MLK that MLK is his brother, and with him 100% but can't take any chances, and that MLK should take care of himself, that MLK is known world wide and should watch out for them whities, said that people in Nigeria, Egypt and Ghani asked about MLK."

[6] The Trial Judge said:

"Turning to the significance of the logs, the only manner in which the foregoing conversations were argued relevant to the defendant's conviction centered around the rejection of the defendant's conscientious objector claim. This was a plausible argument, for if the recommendation by the Department of Justice to deny the claim was based upon illegally obtained

evidence, the 'basis in fact' which this court found for his classification would have been defective. Without such a 'basis of fact', the defendant could effectively challenge the jurisdiction of the draft board which classified him and ordered him to report for induction.

"The specific relevancy sought between the defendant's classification and the overheard conversations involves the statement in the Department of Justice's recommendation that 'registrant's objections to participation in war insofar as they are based upon the teachings of the Nation of Islam "rest on grounds which are primarily political and racial. These constitute objections to only certain types of war in certain circumstances, rather than a general scruple against participation in war in any form."' *Clay* v. *United States*, 397 F. 2d 901 (5 CA 1968). The defendant attempted to show first, that because Log 2 reflects Elijah's wish that Clay become a minister, and because Log 4 reflects Clay's reference to 'them whities' the logs would have a bearing on the Department's conclusion that the defendant's beliefs were political and racial, rather than religious. He secondly attempted to demonstrate how this information was transmitted upward through F.B.I. channels, through the Department of Justice and into the recommendation, and back to the draft appeals board.

"As to the second argument, that the information was used by the Department of Justice in making its recommendation, there was positive testimony that the logs were not used at all in the preparation of the report. Only the most strained construction of the cross-examination testimony would support a contrary finding. But the court need not reach this question, for it believes, and so holds, that the logs are so totally innocuous they could not have had any bearing on the defendant's conviction under any circumstances. This is because, first, as regards Log 2, the Department of Justice's duty was to submit a recommendation concerning the defendant's status as a conscientious objector, not a minister. It is obvious that the Department could have, had it believed it was warranted, recommended that the defendant be granted a conscientious objector deferment despite the fact that he was not a minister of his religion. Moreover, even if this issue had been before the Department, it is clear that the evidence that he was not a minister up to at least March 19, 1966, is overwhelming. See discussion in *Clay* v. *United States, supra* at 915-18. Thus examining this log in a light most likely to demonstrate

There was likewise no error committed by the District Court in rejecting the board and sweeping demands for discovery by defendant's counsel of FBI files, documents, wiretapping information and tapes and transcriptions, relating to persons and conversations not participated in by defendant. All of the logs of recorded conversations of defendant were produced for his inspection except the fifth wiretap which pertained to foreign information gathering

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prejudice to the defendant, there is more than enough evidence to dispel possible taint. The conclusion that the defendant should not have been entitled to a ministerial exemption springs clearly from an 'independent origin'. *Nardone* v. *United States*, 308 U.S. 338 (1939).

"Defendant's attempt to link Log 4 to his conviction must similarly fail. To construe a passing reference to 'them whities' as being the Department's basis, or even partial reason, for holding the defendant's beliefs to be political and racial is completely untenable. The conversation was not a theological discussion. The common slang reference was not within a context which could have had any bearing on the defendant's beliefs. A Negro not a member of the Nation of Islam would be as likely to say the same thing. In addition, if it had been in such a context, and it could be construed to be even viciously derogatory, again there was ample evidence from an independent origin before the Department to conclude that the Muslim religion holds the white race in contempt. See *Clay* v. *United States, supra* at 919 n. 16.

"As regards Logs 1 and 3, they are so totally innocuous even defendant's counsel could not point to any specific language which could bear on the defendant's conviction. The thrust of defendant's argument concerning these logs, as well as Logs 2 and 4 was that there must have been other matters discussed by the parties which were relayed to the Department of Justice. The court does not credit this argument. The testimony was clear that the original tapes were erased immediately after the logs were typed, and that the logs received in evidence were the only ones prepared. The individuals who monitored the conversations in Phoenix testified that they communicated no other information to anyone."

and which we will discuss later. The defendant had no right to see records or logs of conversations to which he was not a party, nor to rummage in Government files. *Alderman* v. *United States*, 395 U. S. 165, 185, 89 S. Ct. 961, 973 (1969); *Taglianetti* v. *United States*, 394 U. S. 316, 317, 89 S. Ct. 1099, 1100 (1969). It is clear from uncontradicted testimony that none of the information obtained in the five wiretapped telephone conversations was used in the FBI investigation of defendant's conscientious objector claim, or in the preparation of the adverse Department of Justice recommendation made in connection with defendant's original request for conscientious objector classification.[7] In our view the Trial Court exercised "informed discretion, good sense, and fairness," *Alderman, supra*, 394 U. S. at 185, 89 S. Ct. at 973, in denying defendant's discovery demands and we perceive no sound reason for interfering with his decision.[8]

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[7] Defendant was mailed a copy of the adverse recommendation on November 29, 1966. *See* 397 F. 2d at 906.

[8] The District Judge, in his memorandum opinion, said in this regard:

> In Alderman v. United States, supra, the Court said that '(n)one of this means that any petitioner will have an unlimited license to rummage in the files of the Department of Justice. Armed with the specific records of overheard conversations and with the right to cross examine the appropriate officials in regard to the connection between those records and the case made against him, a petitioner may need or be entitled to nothing else. Whether this is the case or not must be left to the informed discretion, good sense, and fairness of the trial judge.' Id. at 185. And in Taglianetti v. United States, 394 U.S. 316 (1969), the Court said that '(n)othing in Alderman v. United States, Ivanov v. United States, or Butenko v. United States, ante, p. 165, requires an adversary proceeding and full disclosure for every issue raised by an electronic surveillance. . . . Here the defendant was entitled to see a transcript of his own conversations and nothing else.

The fifth wiretap was not disclosed to defendant because the District Court found that the surveillance was lawful, having been authorized by the Attorney General, for the purpose of obtaining foreign intelligence information. The Supreme Court has not yet decided whether electronic surveillance for the purpose of gathering foreign intelligence information is constitutionally permissible, *Giordano v. United States, supra*, 394 U. S. at 314, 89 S. Ct. at 1165, 1166 (1969), though Mr. Justice White has expressed the view that such surveillance does not violate the Fourth Amendment. *See Katz v. United States*, 389 U. S. 347, 364, 88 S. Ct. 507, 517 (1967).

Moreover, in *Giordano, supra*, 394 U. S. at 314, 89 S. Ct. at 1165, Mr. Justice Stewart in a concurring opinion stated the following in regard to the mandate of *Alderman, supra*,

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He had no right to rummage in government files." Id. at 317. Despite the foregoing, the defendant's counsel insistently requested what would be, in essence, a full-scale inquiry into F.B.I. practices. The court does not believe that anything was shown which would warrant such an inquiry. Defendant had ample opportunity to demonstrate first, that the logs contained prejudicial material, and second, that the material was communicated to and was used by the Department of Justice in making its recommendation. Had he established the first, perhaps more extensive discovery would have been in order. But the defendant should not be permitted such broad discovery to attempt to prove transmittal of the information if he cannot first show that the information could have been, even in part, relevant to his conviction.

"It might be added that Taglianetti v. United States, supra, intimates that the district court could, in some circumstances, make the determination that wiretap evidence is innocuous in an in-camera inspection. This is, the court believes, such a case. Nevertheless, an adequate opportunity was given the defendant to prove relevance in an adversary proceeding. The proceeding was as extensive as Alderman requires. He failed to show the requisite relevancy, and the conviction must stand."

for further hearing and the procedure to be followed in a criminal case where wiretapping information relative to a defendant had been obtained.

> "We have nowhere indicated that this determination cannot appropriately be made in *ex parte, in camera* proceedings. 'Nothing in Alderman v. United States, Ivanov v. United States, or Butenko v. United States, 394 U. S. 165, 89 S. Ct. 961, 22 L. Ed. 2d 176, requires an adversary proceeding and full disclosure for resolution of every issue raised by an electronic surveillance.' Taglianetti v. United States, 394 U. S. 316, 89 S. Ct. 1099, 22 L. Ed. 2d 302."

An in camera examination of the fifth log and a description of the premises which were the subject of the surveillance, together with the Attorney General's express authorization to the FBI to make the surveillance, was accordingly made by the Trial Judge. It has also been made by the three judges of this panel. From this examination we agree that the log of the fifth wiretapped telephone conversation (1) was authorized by the Attorney General in writing to the FBI; (2) that it was not made pursuant to a surveillance of defendant but rather of others, and the premises were identified; (3) that it was made in connection with obtaining foreign intelligence information; (4) that the Executive Branch of the Government has properly and reasonably requested that the log not be published or disclosed to the defendant or the public because "it would prejudice the national interest to disclose the particular facts concerning this surveillance other than to the court *in camera*" (see affidavit of Attorney General Mitchell); and (5) its contents do not in any manner bear

upon the issues involved in defendant's draft law violation case; and in no way has this wiretap prejudiced defendant, helped build a case against him, or assisted in bringing about his conviction.

Defendant and amicus contend that the Supreme Court's decision in *Alderman, supra,* requires an adversary hearing and mandates that all wiretapped information of defendant's conversations be furnished to him, including the fifth log pertaining to foreign intelligence gathering; that the District Court erred in failing to disclose the fifth log to him and in not holding a hearing thereon to determine if the wiretap tainted defendant's conviction; that full disclosure is required by the Constitution and the Bill of Rights, and that section 605 of the Federal Communications Act of 1934, 47 U.S.C. § 605, bars any use of wiretap in a criminal prosecution.

Under the circumstances here, publication of the fifth log to defendant is unwarranted and would be contrary to the national interest, having been obtained in foreign intelligence surveillance. The Court's in camera examination of the fifth log establishes to our satisfaction that the contents of the wiretap were not germane to any issue in this criminal prosecution and conviction. There has been no use against defendant of the information gained by the Government by the fifth wiretap and the information there obtained would not have been of assistance to the prosecutor in constructing a case against defendant. There is no indication that the information was or could be used in any way against defendant.

Determination of this case requires that we balance the rights of the defendant and the national interest. The Attorney General, who acts here for the President and Commander-in-Chief, has submitted his affidavit that the

fifth wiretap was maintained "for the purpose of gathering foreign intelligence information" and the Attorney General opposed disclosure at the hearing because "it would prejudice the national interest to disclose particular facts concerning this surveillance other than to the court." The fifth log was submitted by the Government for an in camera examination by the Court, which has been made both here and in the District Court. The rights of defendant and the national interest have thus been properly safeguarded. Further judicial inquiry would be improper and should not occur. It would be "intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret." *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111, 68 S. Ct. 431, 436 (1948). We, therefore, discern no constitutional prohibition against the fifth wiretap.

Section 605 of Title 47, U.S.C., is a general prohibition against publication or use of communications obtained by wiretapping, but we do not read the section as forbidding the President, or his representative, from ordering wiretap surveillance to obtain foreign intelligence in the national interest. When Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2511(3) thereof, it specifically denied any section 605 limitation, as follows:

> "(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measure as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to ob-

tain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable and shall not be otherwise used or disclosed except as is necessary to implement that power."

This is a clear statement by Congress itself relative to the scope of the section 605 provisions which are not to limit the President's constitutional prerogative to obtain foreign intelligence information.

We reiterate that no use of the fifth log was made in this case against defendant. It played no part in his conviction and our in camera scrutiny thereof thoroughly convinces us that defendant was not prejudiced thereby. As the Supreme Court said in *Taglianetti* v. *United States*, 394 U. S. 316, 317, 318, 89 S. Ct. 1099, 1101 (1969), "Under the circumstances presented here, we cannot hold that 'the task is too complex, and the margin for error too great, to rely wholly on the *in camera* judgment of the trial court.' *Alderman* v. *United States, supra*, 394 U. S., at 182, 89 S. Ct., at 971." No one would seriously doubt in this time of

serious international insecurity and peril that there is an imperative necessity for obtaining foreign intelligence information, and we do not believe such gathering is forbidden by the Constitution or by statutory provision, including 47 U.S.C. § 605.

We are urged to reconsider the issues decided by us in our original decision in this case, 397 F. 2d 901, but we decline to do so.[9] We declined en banc reconsideration of our original decision and further refused en banc consid-

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[9] We have, however, examined the recent holding of the Supreme Court in Welsh v. United States, 398 U.S. 333, 90 S. Ct. 1792 (No. 76, October Term 1969, decided June 15, 1970), to determine if that decision affects the present case. In our view, it does not. The Supreme Court granted Welsh a conscientious objector status because of "deeply and sincerely" held ethical or moral beliefs which imposed on Welsh "a duty of conscience to refrain from participating in any war at any time." The Court found that Welsh's beliefs functioned "as a religion in his life," thereby entitling him to a "religious" conscientious objector exemption under Section 6(j) of the Universal Military Training and Service Act (50 U.S.C. App. §456(j)), 398 U.S. at 335, 90 S. Ct. at 1795. Section 6(j) grants an exemption from service in the Armed Forces to a registrant "who, by reason of religious training and belief, is conscientiously opposed to participation in *war in any form.*" (Emphasis supplied.) As we pointed out in our original opinion in this case, the Department of Justice recommendation (made in connection with the conscientious objector investigation), to the Kentucky Board of Appeals, stated that Clay's beliefs insofar as they are based upon the teachings of the Nation of Islam "rest on grounds which are primarily political and racial. These constitute objections *to only certain types of war in certain circumstances, rather than a general scruple against participation in war in any form.*" (Emphasis supplied.) *See* 397 F. 2d at 918-919. The Kentucky Board of Appeals thereafter continued the I-A classification of Clay. That there was also a "basis in fact" for the numerous local board, state appeal boards (Kentucky and Texas) and Presidential Appeal Board I-A classifications of Clay, thereby including an adverse determination of the question of Clay's basic sincerity, is amply shown and detailed in our original opinion and in the record to which reference is made. *See* 397 F. 2d at 918-921.

eration of this second hearing in this case. Our prior decision is the law of the case on the issues decided there, unless they are affected by the wiretapped telephone conversations.[10] In our view, the defendant's conviction was not so affected and accordingly the judgment of conviction should be

AFFIRMED.[11]

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[10] Defendant has cited the Presbyterian Ch. v. Mary E. B. Hull Mem. Pres. Ch., 393 U.S. 440, 89 S. Ct. 601 (1969), in support of its contention that the Department of Justice's analysis that the teachings of the Nation of Islam are primarily political and racial and that this interpretation violates the establishment clause of the First Amendment. We reject this argument for reasons which we have discussed in full in our original opinion in this case relative to Muslim tenets. *See* 397 F. 2d at 918-921.

[11] We have carefully considered all of the additional contentions of defendant, but find them to be without merit, and accordingly they are rejected.

Order Denying Petition for Rehearing and Petition for Rehearing *En Banc*

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 28252

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CASSIUS MARSELLUS CLAY, JR.,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

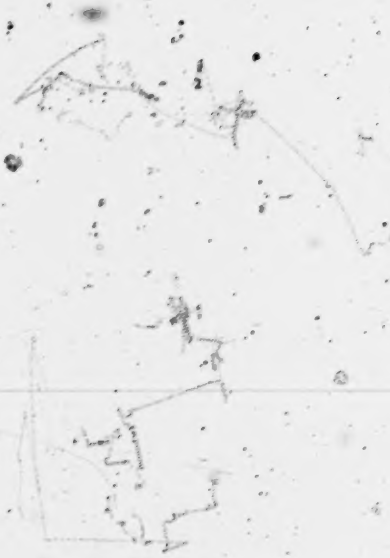
(August 19, 1970)

Before:

WISDOM, AINSWORTH AND CLARK,

Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is also DENIED.



SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
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E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 783

CASSIUS MARSELLUS CLAY, JR.,
also known as MUHAMMAD ALI,

Petitioner,

—v.—

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. .....

CASSIUS MARSELLUS CLAY, JR.,
also known as MUHAMMAD ALI,

Petitioner,

—v.—

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on July 6, 1970. Rehearing was denied on August 19, 1970.

Opinions Below

The opinion of the Court of Appeals for the Fifth Circuit is not yet reported and it is set out in the Appendix hereto, pp. 1a-16a. The opinion of the United States District Court for the Southern District of Texas is unreported and is set out in the Appendix, pp. 18a-27a.

The opinion of the Court of Appeals at an earlier stage of this proceeding is reported at 397 F.2d 901 and is set out in the Appendix, pp. 28a-75a. Petitioner was originally

convicted upon trial by jury in the United States District Court for the Southern District of Texas and no opinion exists with respect to that conviction. The District Court's oral finding of a basis in fact for petitioner's selective service classification is set out in the Appendix, pp. 77a-81a.

Jurisdiction

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on July 6, 1970 and a timely filed petition for rehearing and rehearing in banc was denied on August 19, 1970. By order signed September 15, 1970, Mr. Justice Black extended the time within which to file a petition for writ of certiorari until October 3, 1970. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented for Review

1. Whether the decision of the Court of Appeals is in conflict with the decisions of this Court in *Alderman* v. *United States*, 394 U.S. 165, and *Giordano* v. *United States*, 394 U.S. 310 (1969), and sets a confusing precedent for the administration of the rules laid down in *Alderman* by lower courts? This question subsumes the issues:

   (a) Whether the Court of Appeals erred in creating an undefined exception to the disclosure rule of *Alderman*?

   (b) Whether the Court of Appeals erred in holding that disclosure of the log of the fifth surveillance to petitioner was unwarranted solely on the basis of the Government's conclusory assertion that disclosure would prejudice the national interest?

(c) Whether the Court of Appeals erred in holding that *Alderman* does not require disclosure and a hearing in the case of wiretapping which violates § 605 of the Federal Communications Act?

2. Whether the decision of the Court of Appeals holding that electronic surveillance for the purpose of gathering "foreign intelligence information" does not violate the Fourth Amendment sanctions the irresponsible exercise by the Government of a dangerous and limitless power to invade an individual's privacy? This question subsumes the issues:

(a) Whether the decision of the Court of Appeals is in conflict with the many decisions of this Court holding that the Fourth Amendment bars any search and seizure unless at some point there has been an independent judicial determination of its reasonableness?

(b) Whether the exercise by the Attorney General of the power to engage in such electronic surveillance was unlawful because it lacked the explicit authorization of the President?

3. Whether petitioner has a right to have his draft status determined by a selective service board from which Negroes have not been systematically excluded and whether he can vindicate this right by refusing to submit to an induction order issued by an illegally constituted board?

4. Whether petitioner's conviction should be vacated in light of this Court's decision in *Welsh* v. *United States*, 398 U.S. 333 (1970), because the denial to petitioner of a conscientious objector exemption may have been based upon the Department of Justice's erroneous characterization of his objections to participation in war as "political and racial" rather than "religious?"

5. Whether petitioner's conviction should be reversed because there was no basis in fact for the denial to petitioner of an exemption as a minister for the Lost Found Nation of Islam on the ground that he was also a professional boxer?

Constitutional Provisions, Statutes and Regulations Involved

1. This case involves the First, Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, the pertinent texts of which are set out in the Appendix, pp. 90a-91a.

2. It involves 47 U.S.C. § 605 (Federal Communications Act) and 50 U.S.C. App. §§ 451(c), 455(a), 456(g), 456(j), 460(b)(3) and 462(a) (Universal Military Training and Service Act), the pertinent texts of which are set out in the Appendix, pp. 91a-99a.

3. It also involves Selective Service Regulations, 32 C.F.R. §§ 1600.735-1, 1604.22, 1604.24, 1604.52, 1604.54, 1622.1, 1622.14, 1622.43, 1626.24, 1626.25 and 1627.1, the pertinent texts of which are set out in the Appendix, pp. 91a-107a.

Statement of the Case

A. *Trial, Conviction and First Appeal*

Petitioner Cassius Marsellus Clay, Jr., also known as Muhammad Ali, a black registrant of Selective Service Local Board No. 47, Louisville, Kentucky, was convicted on June 20, 1967 in the United States District Court for the Southern District of Texas of failing to submit to induction into the Armed Forces of the United States in

violation of 50 U.S.C. App. § 462 and sentenced to five years imprisonment and a $10,000 fine. He had been indicted on May 8, 1967 as a result of his refusal on April 28, 1967 to take the traditional "one step forward" which symbolizes induction into the Armed Forces.

Petitioner defended his refusal to submit on the ground that the systematic exclusion of Negroes from his own and all other draft boards in the States of Kentucky and Texas had rendered the induction order void. At trial he showed that in Kentucky only 0.2% of the draft board members were black even though 7.1% of the total population was black, and that in Texas only 1.1% of the draft board members were black even though 11.4% of the total population was black (App. p. 41a). He also contended that he had been erroneously denied conscientious objector and ministerial exemptions based upon his scruples against participation in war and his vocation as a minister for the Lost Found Nation of Islam. Without requiring the Government to rebut petitioner's *prima facie* case of racial discrimination in the selection of his draft boards, the District Court held that such discrimination did not constitute a defense to the charge. The court also found that there was a basis in fact for the denial to petitioner of the draft exemptions he claimed (App. p. 81a).

On appeal, the Court of Appeals rejected all of petitioner's claims and affirmed his conviction (397 F.2d 901; App. p. 28a). It held that systematic exclusion of Negroes from draft board membership was no defense in the prosecution of a Negro registrant for failing to submit to induction pursuant to an order issued by such an unrepresentative draft board. It likened a draft board from which Negroes had been excluded to a malapportioned legislature rather than to a criminal jury and concluded that such a body had *de facto* authority. Thus, even though

petitioner previously had sought in vain to enjoin his induction and to require the reapportionment of draft boards in Kentucky and Texas (App. pp. 34a-38a), the Court of Appeals held that he was not justified in refusing to submit to an induction order that was valid by virtue of the *de facto* authority of the draft board that issued it.

The court also affirmed the District Court's finding that there was a basis in fact for the denial to petitioner of ministerial and conscientious objector exemptions in evidence that petitioner was a professional boxer and that his objections to participation in war based upon the teachings of the Nation of Islam either did not satisfy the statutory requirements for exemption or were insincerely held (App. pp. 57a-68a). A petition for rehearing and rehearing in banc was denied in the Court of Appeals on June 6, 1968, and on July 7, 1968 petitioner filed a petition for certiorari in this Court.

B. *Remand by the Supreme Court*

Subsequent to the filing of its brief in opposition to the petition for writ of certiorari, the United States filed a supplemental memorandum in which it admitted that on five occasions petitioner had participated in conversations which had been monitored by electronic surveillance directed against other persons. On one of these occasions, it was stated, the overhearing occurred in the course of the gathering of "foreign intelligence information." (Supplemental Memorandum for the United States, pp. 1-2). Despite the Government's contention that the overhearing of petitioner's conversation could not have produced any of the evidence used to convict him for violating the Selective Service law (*id.* at p. 4), this Court, *sub nom. Giordano v. United States*, 394 U.S. 310 (1969), granted the petition for certiorari on March 24, 1969, and vacated the Court

of Appeals' judgment affirming his conviction. It remanded the case to the District Court for a determination of whether the electronic surveillance which overheard petitioner's conversations was unlawful and, if so, whether the evidence obtained thereby tainted his conviction. (*Id.* at 312.) This determination of taint was required to be made in conformity with *Alderman* v. *United States*, 394 U.S. 165 (1969), which required full disclosure of all "surveillance records as to which any petitioner has standing to object . . . without being screened in camera by the trial judge" (*id.* at 182), even though such disclosure was "attended by potential danger . . . to the national security" (*Id.* at 181).

C. *Proceedings on Remand and Reentry of Judgment of Conviction*

Upon remand, the logs of four conversations were disclosed to petitioner, and on June 2, 4, 5 and 6, 1969 the District Court conducted an adversary hearing to determine whether the fruits of the surveillance directly or indirectly tainted his conviction. The Government did not deny that these four logs were obtained illegally (App. p. 20a). The court found that the four logs contained nothing that was prejudicial to, or that was in fact used against, petitioner in connection with his Selective Service classification or with his conviction (App. p. 24a).

The Government submitted the log of the fifth surveillance to the District Court as a sealed exhibit to an affidavit executed by Attorney General Mitchell (App. p. 82a). According to the affidavit, petitioner's conversation had been overheard in June, 1965 "by government agents who were monitoring a wiretap which was being maintained for the purpose of gathering foreign intelligence information" (*Ibid.*). Included in this sealed exhibit was a descrip-

tion of the premises which were the subject of the surveillance. A second sealed exhibit to the affidavit contained a copy of a memorandum allegedly reflecting approval of the installation of the surveillance by the then Attorney General. In his affidavit, Attorney General Mitchell purported to submit the exhibits "solely for the court's *in camera* inspection" because "it would prejudice the national interest to disclose the particular facts concerning this surveillance other than to the court" (App. p. 83a).

Solely on the basis of this information, the District Court decided, after an ex parte, in camera inspection, that the surveillance from which the fifth log had been obtained was lawful under the Fourth Amendment because it was "for the purpose of gathering foreign intelligence information" and had been approved by the Attorney General (App. p. 27a). Pursuant to the statement of this Court in *Giordano* that "a finding by the district court that the surveillance was lawful would make disclosure and further proceedings unnecessary," 394 U.S. at 313, the court refused to disclose to petitioner the log of the fifth conversation and held an adversary hearing to determine whether it tainted his conviction (App. p. 26a). On July 24, 1969, the District Court entered a new judgment of conviction and resentenced appellant to five years' imprisonment and a fine of $10,000.

D. *Second Appeal*

The Court of Appeals again affirmed petitioner's conviction. It agreed with the District Court that the four disclosed logs were "so totally innocuous that they could not have had any bearing on the defendant's conviction under any circumstances" (App. p. 6a). With respect to the undisclosed log of the fifth surveillance, the Court of Appeals made three interrelated rulings. First, solely on

the basis of the conclusory affidavit of Attorney General Mitchell that "it would prejudice the national interest to disclose the particular facts concerning this surveillance other than to the court *in camera*" (App. p. 83a), it held that "the publication of the fifth log to defendant is unwarranted and would be contrary to the national interest" (App. p. 12a). Second, in spite of *Alderman's* disclosure requirement, it held that its own in camera inspection of the fifth log "establishes to our satisfaction that the contents of the wiretap were not germane to any issue in this criminal prosecution and conviction" (App. p. 12a). Finally, in an unprecedented decision, the Court of Appeals eschewed any independent judicial determination of the reasonableness of the fifth surveillance and affirmed the District Court's conclusion that it did not violate the Fourth Amendment because it had been maintained in connection with obtaining foreign intelligence information (App. pp. 13a, 15a).

Although petitioner had raised again all of the issues which had been decided against him on his first appeal, the Court of Appeals refused to reconsider its original decision. It did, however, conclude that this Court's decision in *Welsh v. United States*, 398 U.S. 333 (1970), did not affect this case even though the denial to petitioner of a conscientious objector exemption was based upon a Department of Justice recommendation that had characterized petitioner's objections to participation in war based on the teachings of the Nation of Islam as "political and racial" (App. p. 15a, n. 9).

On August 19, 1970, a petition for rehearing was denied by the panel of the Court of Appeals that decided the case and a majority of the members of the court in regular active service voted against a rehearing in banc (App. p. 17a).

REASONS FOR GRANTING THE WRIT

Introduction

Petitioner seeks review in this Court of two decisions of the United States Court of Appeals for the Fifth Circuit. The issues raised by the first decision affirming petitioner's conviction are appropriately raised now because this Court did not consider them when it vacated the Court of Appeals' judgment in *Giordano* v. *United States*, *supra*, and remanded petitioner's case to the District Court for further proceedings in conformity with *Alderman*. On appeal from the District Court's reentry of a judgment of conviction, petitioner urged the Court of Appeals to reconsider its first decision. With the exception of its consideration of the effect of this Court's decision in *Welsh* v. *United States*, 398 U.S. 333 (1970), however, it refused to reconsider its previous disposition on the ground that that decision was the law of the case (App. p. 16a). Thus, the issues raised in the Court of Appeals on both occasions may be properly brought before this Court for review at this time.

These issues are of enormous contemporary importance. They involve the conflict of fundamental rights of citizens with the most sweeping powers of government. At the heart of the controversy is the question of the extent to which an individual's rights under the First, Fourth and Fourteenth Amendments can constitutionally be abridged by the power of the government to raise armies and to engage in unlimited surreptitious electronic surveillance for the purpose of gathering "foreign intelligence information."

In the first decision, even though the Court of Appeals condemned the exclusion of Negroes from the Selective Service System (App. p. 44a), it invoked "the imperative necessity for the maintenance of the national integrity as

upheld by the military forces of the United States" to support its conclusion that petitioner could not challenge such exclusion as a defense in his criminal prosecution (App. p. 47a). And in the second decision, the Court of Appeals invoked the "imperative necessity for obtaining foreign intelligence information" to justify the creation of a dangerous and unprecedented exception to the guarantees of the Fourth Amendment (App. p. 15a). Thus, on two separate occasions petitioner has been the victim of illegal Government action and has been denied any redress out of a supposed "imperative necessity." Petitioner calls upon this Court to restore the balance established by the Constitution between his rights and the powers the Government claims are necessary for the national defense.

The fairness and regularity of the operations of the Selective Service System are of crucial importance in the lives of millions of Americans. Especially at a time when this Nation is engaged in a costly war, the system that selects men for service must be held to the highest constitutional standards. That racial discrimination in the appointment of draft board members continues to flaw seriously the integrity of this system, makes petitioner's case one which it is essential that this Court review.

The issues raised by the second decision of the Court of Appeals are equally important. It is the first authoritative decision by an appellate court dealing with the legality of Government electronic surveillance in national security cases and with the procedures for reconciling a defendant's right to disclosure of illegally obtained evidence and the Government's interest in secrecy. The decision sanctions the exercise by the Government of an essentially arbitrary power to intrude upon an individual's privacy and denies to the victim any opportunity for showing that the intrusion was illegal and prejudicial. The Court of Appeals' errone-

ous decision will undoubtedly have a widespread and significant influence in the development of the law in this area unless reversed by this Court.

One other issue decided by the Court of Appeals merits review by this Court. In its first decision the Court of Appeals found that there was a basis in fact for the denial to petitioner of a conscientious objector exemption despite the reliance by the Department of Justice on the "political and racial" source of petitioner's objections to participation in war in recommending rejection of his claim. In its second decision the court held that *Welsh* v. *United States, supra*, did not affect its previous ruling on petitioner's conscientious objector claim. Since the *Welsh* case makes clear that a "political and racial" foundation for conscientious scruples against participation in war may satisfy the statutory requirements for exemption, petitioner submits that his conviction should be vacated and the case remanded in light of *Welsh*.

I.

The Decision of the Court of Appeals Is in Conflict With the Decisions of This Court in *Alderman* v. *United States* and *Giordano* v. *United States* and Sets a Confusing Precedent for the Administration of the Rules Laid Down in *Alderman* by Lower Courts.

A. *The Court of Appeals Erred in Creating an Undefined Exception to the Disclosure Rule of Alderman*

In *Alderman* v. *United States, supra,* this Court laid down the general rule that all records of illegal electronic surveillance to which a defendant has standing to object must be disclosed to him and an adversary hearing held to determine whether his conviction was tainted thereby. That such disclosure might prejudice the national interest was held not to justify an in camera screening of surveillance records by the trial judge to identify only those that are arguably relevant for disclosure to the defendant. In *Giordano* v. *United States, supra,* this Court specifically remanded this case to the District Court for proceedings in conformity with *Alderman.*

Even though petitioner clearly had standing to object to the fifth surveillance under *Alderman,*[1] the Court of Appeals held that it could properly make an in camera determination that the surveillance was not arguably relevant to petitioner's conviction because disclosure of the log to petitioner would prejudice the national interest. Thus, the Court of Appeals created an exception to the disclosure rule of *Alderman.* But, its opinion provides no rationale for the exception and fails to distinguish *Alderman* in any way.

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[1] *Alderman* held that any party to a conversation that is overheard by illegal electronic surveillance has standing to object. 394 U.S. at 176.

The court simply held:

> "Under the circumstances here, publication of the fifth log is unwarranted and would be contrary to the national interest, having been obtained in foreign intelligence surveillance. The Court's in camera examination of the fifth log establishes to our satisfaction that the contents of the wiretap were not germane to any issue in this criminal prosecution and conviction. There has been no use against the defendant of the information gained by the Government by the fifth wiretap and the information there obtained would not have been of assistance to the prosecution in constructing a case against defendant. There is no indication that the information was or could be used in any way against defendant." (App. pp. 12a-13a).

The position of the Court of Appeals, therefore, is identical to the position of the dissent in *Alderman,* flatly rejected by this Court, that in camera determinations should be permitted in cases where disclosure would prejudice national security. Indeed, since Mr. Justice Harlan favored in camera proceedings only where the defendant had been indicted or convicted for espionage, thus creating a reasonable probability that he could not be trusted to preserve the secrecy of the disclosed material, it would appear that eight members of this Court would have required disclosure of the contents of the fifth surveillance to petitioner, who was convicted only of a Selective Service law violation.

Nothing this Court said in *Alderman,* moreover, suggests a basis for distinguishing petitioner's case. The fact that the log of only one surveillance was considered in camera cannot support this result. On the contrary, the one log might contain the "apparently innocent phrase, a chance remark, a reference to what appears to be a neutral

person or event" that this Court considered potentially significant in the determination of taint. 394 U.S. at 182. Other reasons suggested by the record for distinguishing petitioner's case from *Alderman*—the fact that the surveillance was not directed at petitioner, or the lack of any obvious connection between any tainted evidence and a conviction for refusal to submit to induction—fail to supply any rationale for the distinction. For when the Solicitor General informed this Court of the existence of the logs of petitioner's conversation, he took pains to point out that the surveillance had not been directed at petitioner, that only five logs were involved, and that the overhearing had taken place years prior to his conviction. He argued that the possible connection between the conversations and a Selective Service law violation was so slight that they could not possibly have produced any of the evidence used to convict petitioner. But this Court's action in vacating petitioner's conviction *sub nom., Giordano* v. *United States, supra,* and remanding for proceedings in conformity with *Alderman* to determine whether the logs tainted this conviction was at least a tacit rejection of the Government's arguments.

Thus, the Court of Appeals has not only created an exception to the *Alderman* disclosure requirements but in failing to provide a rationale has deprived this and other courts of any basis upon which to evaluate and administer the exception. The Court of Appeals rejected the explicitly articulated premise of *Alderman* that the difficulty in distinguishing between records that are, and those that are not, arguably relevant to a showing of taint requires full disclosure of all illegal evidence. But, the court supplies no analysis of how and where to draw the line. Instead, in holding that in camera determinations of arguable relevance may be made under some undefinable circumstances the court creates an exception to *Alderman's* dis-

closure rule that is as broad as the rule itself. Since the factual predicate of the decision cannot be disclosed, other courts and litigants can only guess at the meaning of the decision.

The effect of such a jurisprudence where courts fail to disclose the basis of their decisions for fear of prejudice to the national security will be to create confusion among lower courts and make the rational administration of the *Alderman* rules impossible. Indeed, the only way to assure uniformity in the application of *Alderman* under such circumstances is for this Court to grant review in every case of nondisclosure.

Petitioner submits that this Court should grant review in this case to affirm that *Alderman* means what it very clearly says. The task is too difficult and the possible prejudice to the defendant too great to make exceptions to the requirement of full disclosure of all records of illegal surveillance to which a defendant has standing to object.

But even if this Court is of the opinion that the *Alderman* requirements should not be absolute and unyielding, it should nevertheless grant review to articulate under what circumstances an in camera proceeding to determine "arguable relevance" may be proper. If the Court of Appeals' decision, which is the first authoritative application of the *Alderman* rules in a "national security" case, is allowed to stand, the certainty of the procedures for dealing with records of illegal electronic surveillance established by *Alderman* will be lost. Courts will be free to read *Alderman* as broadly or as narrowly as they see fit since there will be no effective way to assure its uniform application. This Court should not tolerate the introduction of such confusion and uncertainty into the system of criminal justice.

B. *The Court of Appeals Erred in Holding That Disclosure of the Log of the Fifth Surveillance to Petitioner Was Unwarranted Solely on the Basis of the Government's Conclusory Assertion That Disclosure Would Prejudice the National Interest.*

If *Alderman* v. *United States, supra,* is to allow of an exception to its disclosure rule when disclosure might prejudice the national interest, it is essential that there be an independent judicial determination that the Government's interest in secrecy outweighs the accused's Sixth Amendment rights of confrontation and cross-examination. Any deviation from the adversary hearing mandated by *Alderman* for determining whether a conviction is tainted by illegal surveillance should not be lightly allowed. Only the "clearest and most compelling considerations" can ever justify such an infringement upon the deeply-rooted guarantees of the Sixth Amendment. *Dennis* v. *United States,* 384 U.S. 855, 873 (1966); see *Green* v. *McElroy,* 360 U.S. 474 (1959); *Pointer* v. *Texas,* 380 U.S. 400 (1965).

Yet, the court below relied entirely upon the conclusory assertion in the affidavit of Attorney General Mitchell for its finding that disclosure of the log of the fifth surveillance to petitioner would prejudice the national interest. Indeed, it merely quotes a portion of the Attorney General's affidavit as justification for its in camera inspection of the log for relevance (App. p. 11a).

Petitioner submits that an independent judicial determination of the necessity for nondisclosure is required to guarantee to a defendant that his Sixth Amendment rights will not be abridged without adequate justification. The reliance by courts upon a conclusory assertion by the Government would condition a defendant's rights upon the unreviewable statements of his adversary. Such a result clearly violates the many injunctions of this Court that

require careful balancing of the rights of the individual with the concerns of the Government before upholding a claim of governmental privilege. See *Roviaro* v. *United States*, 353 U.S. 53 (1957); *Dennis* v. *United States*, 384 U.S. 855 (1966); *Jencks* v. *United States*, 353 U.S. 657 (1957); *Campbell* v. *United States*, 365 U.S. 85 (1961).

The decision of the Court of Appeals falls far short of what even the dissenters in *Alderman* would require as a predicate for an in camera determination of relevance. Although Justices Harlan and Fortas would agree with the Court of Appeals that there should be an exception to the requirement of *Alderman* that all logs to which a defendant has standing to object be disclosed to him, they would nevertheless require that the trial judge assure himself that in camera proceedings were justified by a compelling national security interest. Mr. Justice Harlan would "lay upon trial judges the affirmative duty of assuring themselves that the national security interests claimed to justify an in camera proceeding are real and not merely colorable" and subject their decisions "to the most searching scrutiny on appeal." *Alderman* v. *United States*, 347 U.S. 165, 199, 200 (1969). And Mr. Justice Fortas would not permit in camera proceedings unless "the trial court explicitly determines, in written findings, sealed and available for examination by reviewing courts, that disclosure would substantially injure national security interests." *Id.* at 209-10.

Neither of the rulings of the courts below bear any resemblance to this manner for determining the necessity for nondisclosure. Both courts looked no further than the Attorney General's statement that the surveillance was for the purpose of gathering foreign intelligence information and that disclosure "would prejudice the national

interest." Thus, not only did the courts below fail to make any explicit findings that can be reviewed on appeal, but the affidavit of the Attorney General is on its face insufficient even by the standards of the dissenters in *Alderman* to justify in camera proceedings. He alleges only that the "national interest" rather than a "real national *security* interest" is involved and he merely asserts that this interest will be "prejudiced" rather than "substantially injured."

The importance of a searching judicial inquiry into the basis of the government's claim of privilege cannot be overemphasized. Without it the bare claim of privilege based on "prejudice to the national interest" may mask insubstantial reasons for curtailing a defendant's right to disclosure. This is clearly demonstrated in the record below where the Government initially sought a nonpublic hearing in the District Court on the issue of whether the four surveillance logs that were disclosed to petitioner tainted his conviction. The Government's fanciful justification for denying petitioner the important right to a public hearing, see *In Re Oliver,* 333 U.S. 257 (1948), was that a public hearing would endanger the *national security* because "there are militant members who will attempt to use any excuse to stir up [trouble] . . . the danger to the national security is . . . that some people may attempt to use the fact that people who have stated strong opposition to our government and the form of our government, will use the fact of these surveillances to stir up more trouble." (Transcript of Proceeding in Closed Court, p. 7).

Petitioner contends that his right to disclosure of the log of the fifth surveillance cannot be concluded by the Government's claim of privilege without, at a minimum, an independant judicial determination that the *bona fide* purpose of the surveillance was to gather foreign intelligence and that disclosure of the log to him would substantially

injure national security interests. As this Court has said in a similar situation, the Government must "satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." *United States* v. *Reynolds*, 345 U.S. 1, 10 (1953).

This determination, moreover, should be made on the basis of an adversary hearing at which the Government must make some factual showing as to why disclosure would seriously threaten national security and the defendant is given an opportunity to rebut it. Although in such a case it might be proper to limit adversary scrutiny into the Government's claim of privilege so that its object would not be defeated, *United States* v. *Reynolds, supra*, 345 U. S. at 8, there must nevertheless be enough of an inquiry to show that the claim is justified. This proceeding, which may include the taking of extrinsic testimony, is the only way to insure that the trial judge's ruling is based upon the fullest possible knowledge of all of the relevant circumstances, *Campbell* v. *United States*, 365 U. S. 851 (1961). No less can be required as a prerequisite for depriving a defendant of his right to disclosure, the importance of which this Court recognized in *Alderman*.

In the absence of some determination of what constitutes "foreign intelligence gathering" and of what "prejudice to the national interest" justifies an in camera proceeding, lower courts have no guidance in deciding future cases of this nature. If there is to be any exception allowed to the *Alderman* disclosure rules it is essential that courts be provided with some standards by which they can evaluate the basis of claims of privilege urged by the Government. The Court of Appeals' decision abdicates any such inquiry and instead relies upon

the unchallengable assertions of the Government. This Court, therefore, should grant review and reverse the decision of the Court of Appeals. It must be made clear that if the crucial values of the adversary system are ever to be dispensed with, a court must first assure itself that a substantial injury to national security will occur by disclosure of information to a defendant.

C. *The Court of Appeals Erred in Holding That Alderman Does Not Require Disclosure and a Hearing in the Case of Wiretapping Which Violates §605 of the Federal Communications Act.*

Petitioner contended below that regardless of whether the fifth surveillance violated the Fourth Amendment, *Alderman* required full disclosure of the fifth log because the surveillance was illegal under § 605 of the Federal Communications Act, 47 U.S.C. § 605.[2] Although this Court in *Alderman* only addressed itself to surveillance that was illegal under the Fourth Amendment, petitioner argued that the rationale of *Alderman* applied equally where the surveillance violated the Federal Communciations Act. The Court of Appeals, however, appeared to hold that § 605 does not require disclosure and a hearing under *Alderman*.[3]

[2] In his affidavit, the Attorney General admitted that the fifth surveillance was a wiretap (App. p. 82a). At the time of the surveillance of petitioner, wiretapping was not considered to be a violation of the Fourth Amendment unless a trespass of a constitutionally-protected area was involved. See *Katz* v. *United States*, 389 U.S. 347 (1967).

[3] Of course, the Court of Appeals may have only have concluded that an in camera determination of relevance was permissible regardless of whether the surveillance violated the Fourth Amendment or § 605. The court's specific discussion of § 605, however, as we point out *infra*, indicates that it may have distinguished between Fourth Amendment and § 605 cases insofar as disclosure under *Alderman* is concerned. Since petitioner contends that § 605 is an independent basis for disclosure under *Alderman*, this aspect of the court's opinion deserves this separate treatment.

The court did not explain its ruling as to why a different result should obtain where § 605 rather than the Fourth Amendment was involved. But its discussion of the construction of § 605 under which interception *and* use or publication, but not interception alone, is considered a violation of the statute suggests what the court may have thought provided a basis for the distinction it created (App. pp. 13a-14a). Since the court determined on the basis of its in camera inspection that there had been no use or publication of the log of the fifth surveillance, it might then have concluded that there had been no violation of § 605. And since *Alderman* only requires disclosure of records of illegal surveillances, *Giordano* v. *United States*, 394 U. S. 310, 311 (1969), there would be no need to turn over to petitioner the log of the fifth surveillance. Thus, the court might have reasoned that it had only made an in camera determination of the *legality* of the surveillance—which Mr. Justice Stewart pointed out in *Giordano* (394 U.S. at 314), had not been foreclosed by this Court.[1] Because of the peculiar construction of § 605, however, the determination of legality was at the same time a determination of whether the surveillance was relevant to the conviction.

Neither this nor any other reasoning can justify not applying the *Alderman* disclosure rules to a case where only wiretapping, rather than a surveillance that violated the Fourth Amendment, is involved. The interest of a defendant in the full disclosure of evidence that cannot legally be used against him and the complexity of the determination of whether the evidence is relevant to his

[1] In the court below, petitioner argued that the determination of legality, as well as the determination of relevance, "is too complex, and the margin of error too great, to rely wholly on the in camera judgment of the trial court". *Alderman* v. *United States*, *supra*, 394 U.S. at 182.

conviction is just as great when there has been a wiretap as when there has been an unconstitutional surveillance.[5] In light of the fact that the exclusionary rule of § 605 has always been equated with the exclusionary rule of the Fourth Amendment, see *Alderman* v. *United States*, *supra*, 394 U. S. at 172; *Benanti* v. *United States*, 355 U. S. 100 (1957); *Goldstein* v. *United States*, 316 U. S. 114 (1942); *Coplon* v. *United States*, 185 F.2d 629 (2d Cir. 1950), *cert. denied*, 342 U. S. 920 (1951), it would be anomolous to permit in camera determinations of whether evidence tainted a conviction in wiretapping cases on the pretext of deciding the legality of the wiretap while requiring full disclosure in Fourth Amendment cases. Petitioner submits that *Alderman* must be read to require full disclosure and an adversary hearing to determine taint in any case where evidence resulting from electronic surveillance could not legally be used by the Government in building a case against a defendant, regardless of whether the interception was illegal under the Fourth Amendment or whether its interception *and* use or publication would be illegal under § 605.

In view of the obscurity of the Court of Appeals' opinion, petitioner cannot be sure that the court intended to draw such an untenable distinction as to the application of *Alderman* in wiretapping and in Fourth Amendment cases. It is certain, however, that petitioner's confusion as to what the Court of Appeals decided in this case will be mirrored by the many courts and litigants who will have to grapple with these elusive issues in the futre. For this reason, this Court should grant review

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[5] Indeed, the determination of "legality" in a wiretapping case would be more complex than the determination of "arguable relevance" that this Court disallowed in *Alderman*. It would involve a decision of the ultimate issue as to whether the evidence was in fact used rather than whether it might be arguably relevant.

so as to clarify the meaning of the *Alderman* decision and to set clear standards for compliance with it by lower courts.

II.

The Decision of the Court of Appeals Holding That Electronic Surveillance for the Purpose of Gathering "Foreign Intelligence Information" Does Not Violate the Fourth Amendment Sanctions the Irresponsible Exercise by the Government of an Unprecedented and Limitless Power to Invade an Individual's Privacy.

A. *The Decision Is in Conflict With the Many Decisions of This Court Holding That the Fourth Amendment Bars Any Search and Seizure Unless at Some Point There Has Been an Independent Judicial Determination of Its Reasonableness.*

Both courts below decided the novel and important issue of the constitutionality of electronic surveillance relating to the gathering of foreign intelligence information.[6] As Mr. Justice Stewart pointed out in his concurring opinion in *Giordano* v. *United States*, 394 U. S. 310, 314 (1969), it is an issue to which this Court has never addressed itself. It is, moreover, an issue of the utmost significance since it requires a balancing of the most precious individual rights with what is perhaps one of the most compelling governmental interests—self-preservation.

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[6] Since both the Court of Appeals and the District Court decided the issue of the legality under the Fourth Amendment of the electronic surveillance maintained for the purpose of gathering foreign intelligence information, we must assume that the surveillance was "trespassory" under the then prevailing constitutional standards. See *Kaiser* v. *New York*, 394 U. S. 244, 282 (1969). Otherwise, it would have been unnecessary for the courts below to have decided this difficult and important constitutional issue of first impression.

The District Court held that the fifth surveillance did not violate the Fourth Amendment even though it made no independent determination that the surveillance had been reasonable and even though there had been no prior authorization of the surveillance by a judicial warrant. Instead, the court concluded that where surveillances have been authorized by the Attorney General for the purpose of gathering foreign intelligence information "the judiciary should [not] question the decision of the executive department that such surveillances are reasonable and necessary to the protection of the national interest" (App. p. 27a). On appeal, based only upon the Government's assertion that foreign intelligence gathering was involved, the Court of Appeals concluded simply that: "We . . . discern no constitutional prohibition against the fifth wiretap" (App. p. 13a). And this extraordinary ruling was accompanied only with the terse explanation that:

> "No one would seriously doubt in this time of serious international insecurity and peril that there is an imperative necessity for obtaining foreign intelligence information, and we do not believe that such gathering is forbidden by the Constitution . . . ." (App. p. 15a).

With respect to a judicial determination of the reasonableness of the surveillance, the court held that such "judicial inquiry would be improper and should not occur" (App. p. 13a).

Thus, for the first time federal courts have abdicated completely their constitutional responsibility for assessing the reasonableness under the Fourth Amendment of a search and seizure. By eschewing any independent judicial determination whatsoever of the reasonableness of electronic surveillance by the Government, the courts below have in effect suspended the Fourth Amendment in

cases where foreign intelligence gathering is involved. And in so doing they have ignored the premise that has been firmly established by this Court in countless decisions that:

> "The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in the light of the particular circumstances." (*Terry* v. *Ohio*, 392 U. S. 1, 21 (1968))

The courts below legitimized a sweeping invasion of privacy that recalls the "executive" warrants which were denounced by James Otis in 1761 as the "worst instrument of arbitrary power." *Boyd* v. *United States*, 116 U. S. 616, 625 (1886). They announce a doctrine that is at war with what the framers of the Constitution had in mind when they drafted the Fourth Amendment. For at that time the tyranny of the Crown's suppression of alleged subversives and nonconformists uncovered by means of general searches of private papers and documents was of recent vintage. And so, too, was the landmark case of *Entick* v. *Carrington*, 19 How. St. Tr. 1029 (1765), where the court had held the British Secretary of State liable for a trespass growing out of a search and seizure of papers thought libelous and subversive of public order which he had authorized by the issuance of a "writ of assistance." See *Boyd* v. *United States*, *supra*, 116 U. S. at 626-30.

There is not, nor can there be, a general exception to the constitutional guarantees of personal liberty and security embodied in the Fourth Amendment based upon the defense of the "national security" or the exercise of "war powers" by Congress or the Executive. As this Court has said:

> ". . . the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. 'Even the war power does not remove constitutional limitations safeguarding essential liberties' [citation omitted.]
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> "[T]his concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of legislative power . . . . Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its constitution, ... It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the nation worthwhile." (*Robel* v. *United States*, 389 U.S. 258, 263-64 (1967).)

The powers of the Executive to authorize electronic surveillance for the purpose of gathering foreign intelligence information must, therefore, be exercised in accordance with the Fourth Amendment which requires a judicial determination of the reasonableness of any governmental invasion of a citizen's personal security. But in rejecting the Fourth Amendment's limitations, the courts below appeared to conclude that courts were completely unable to make such determinations. The District Court thought that:

> "It would not be feasible for the executive to bring to the court's attention all the factual and policy considerations supporting the decision [to utilize electronic surveillance]. Moreover, it is the executive, not the judiciary, which alone possesses both the expertise

and the factual background to assess the reasonableness of the surveillance." (App. p. 27a).

In similar vein, the Court of Appeals said that it "would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret'," quoting from *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.*, 333 U. S. 103, 111 (1948). (App. p. 13a).

It is no doubt true that the reasonableness of foreign intelligence surveillance, which involves the accumulation and collation of a great deal of superficially irrelevant information with the view toward the discovery of espionage activities, cannot be evaluated in the conventional terms of whether there is probable cause to believe that a certain surveillance will disclose evidence of a particular crime. See *Katz* v. *United States*, 389 U. S. 347 (1967); *Osborn* v. *United States*, 385 U. S. 232 (1966); *Berger* v. *United States*, 385 U. S. 41 (1967). But this does not justify the holdings of the courts below that the Fourth Amendment has no meaningful application in this area. This Court has recognized that the standards of "probable cause" may vary depending upon the nature of the governmental interest to be served by a search. The Fourth Amendment's warrant procedure:

> "is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest . . . If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant." (*Camara* v. *Municipal Court*, 387 U. S. 523, 529 (1967))

When foreign intelligence surveillance is likely to disclose information that is essential to the national security,

therefore, there may be "probable cause" to justify an intrusion upon the constitutionally protected interests of private citizens. This determination is of crucial importance because the individual interests at stake are among the most fundamental in a constitutional system. Not only is electronic surveillance the most extreme intrusion yet devised upon the right of personal privacy and security, but it constitutes a serious infringement of the rights protected by the First Amendment. Mr. Justice Brennan has pointedly observed:

> "Electronic surveillance strikes deeper than at the ancient feeling that a man's home is his castle; it strikes at freedom of communication, a postulate of our kind of society . . . [F]reedom of speech is undermined where people fear to speak unconstrainedly in what they suppose to be the privacy of home and office . . . If electronic surveillance by government becomes sufficiently widespread, and there is little prospect for checking it, the hazard that as a people we may become hagridden and furtive is not fantasy." (*Lopez* v. *United States*, 373 U. S. 427, 470 (1963) (dissenting opinion))

To hold, as did the courts below, that the balance between the need to gather foreign intelligence by electronic surveillance and these individual interests must always be struck in favor of the Government without any judicial inquiry is to denigrate this Nation's most cherished values. And to explain such a decision on the grounds that courts are institutionally incapable of balancing the conflicting interests is to ignore the historic functions of the courts. *Cf. Barenblatt* v. *United States*, 360 U. S. 109 (1959); *Baker* v. *Carr*, 369 U. S. 186 (1962).

The reasoning of the courts below that courts do not have the expertise to evaluate the factual and policy con-

siderations in any decision to employ electronic surveillance is no more persuasive than the argument advanced in *Camara* v. *Municipal Court, supra*, that courts could not function effectively in the field of municipal health and safety inspections because the "decision to inspect is based upon legislative or administrative assessment of broad factors . . ." 387 U. S. at 532. In rejecting this contention, this Court concluded that where the exercise of an indispensably important governmental power would "be greatly hobbled by the blanket requirements of safeguards necessary for a search of evidence of criminal acts" the:

> "'official need not show the same kind of proof to a magistrate to obtain a warrant as one must who would search for the fruits or instrumentalities of crime. Where considerations of health and safety are involved, the facts that would justify an inference of 'probable cause' to make an inspection are clearly different from those that would justify an inference where a criminal investigation has been undertaken. . . . The test of 'probable cause' required by the Fourth Amendment can take into account the nature of the search that is being sought'." (387 U. S. at 537-38, quoting from *Frank* v. *Maryland*, 359 U. S. 360 (1959) (Douglas, J. dissenting opinion.))

Similarly, instead of the standard in the criminal case of whether there is probable cause that a search will discover evidence of a crime, in the case of foreign intelligence surveillance the inquiry would be whether there is probable cause that the surveillance will disclose information essential to national defense and security. While it might be reasonable under such a standard to permit electronic surveillance of a foreign embassy that has frequently been involved in espionage activities, it is hard to conceive of circumstances under which it would have been reasonable

to install wiretaps on the phones of Dr. Martin Luther King, Jr. or Elijah Muhammad. Once it is recognized that the elements of "probable cause" may be of a different nature with respect to foreign intelligence surveillance, it is apparent that the judiciary is no less able than the executive to evaluate its reasonableness. Only the detachment and neutrality of a judicial officer, moreover, can fully protect the rights of the individual against the competing claims of the Government.

The only case cited by either of the courts below in support of their refusal to test the reasonableness of the Government surveillance was *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.*, 333 U.S. 103 (1948), cited by the Court of Appeals (App. p. 13a). But it is completely inapposite. There, this Court merely held that the control of the decisions of the Civil Aeronautics Board with respect to international air routes committed to the President by statute was final and could not be reviewed by a court. In choosing to place the final decision on such matters within the unfettered discretion of the President, Congress recognized that his decision must be based on foreign policy considerations that were not amenable to judicially manageable standards. Whereas judicial review of executive decisions may not be necessary in the case of a statutorily created franchise, neither Congress or the Executive may dispense with the constitutional requirements of the Fourth Amendment.

Finally, the Court of Appeals can derive no support from the concurring opinion of Mr. Justice White in *Katz* v. *United States*, 389 U. S. 347, 362 (1967). Mr. Justice White only expressed the view that the Fourth Amendment does not require a warrant procedure in national security cases. He did not intimate, as suggested by the Court of Appeals (App. p. 10a), that foreign intelligence

surveillance is immune from any requirement of reasonableness under the Fourth Amendment.

Since the courts below held that the fifth surveillance was lawful under the Fourth Amendment without any independent judicial determination of its reasonableness, the issue as to the procedure by which such a determination should be made was not considered and is not directly at issue here. Notwithstanding Mr. Justice White's concurrence in *Katz* v. *United States, supra*, however, petitioner sees no reason why the reasonableness determination should not be made in a modified warrant procedure similar to that mandated by this Court in *Camara* v. *Municipal Court, supra* and *Davis* v. *Mississippi*, 394 U.S. 721 (1969). It is clear that none of the established exceptions to the warrant requirement of the Fourth Amendment are applicable. No search incident to an arrest is involved, *Agnello* v. *United States*, 269 U.S. 20, 30 (1925); there is no emergency endangering lives, *Warden* v. *Hayden*, 387 U.S. 294 (1967); *Terry* v. *Ohio*, 392 U.S. 1 (1968); and there is no risk of irretrievable loss of evidence, *Chambers* v. *Maroney*, 399 U.S. 42 (1970); *Schmerber* v. *California*, 384 U.S. 757 (1966). And the only basis for suggesting that the warrant requirement itself is likely to frustrate the governmental purpose behind the search, *Camara* v. *Municipal Court, supra*, 387 U.S. at 533, is that the judges who would issue ex parte warrants cannot be trusted. Yet, the in camera disclosure of national security information to the courts below in this very case presupposes confidence in the federal judiciary.

On the other hand, the alternative to a warrant procedure for national security surveillance provided in § 2511(3) of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. § 2511(3)) may also meet constitutional standards. There Congress provided that the "contents of

any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers [to engage in electronic surveillance in order to protect national security] may be received in evidence *only where such interception was reasonable . . .*" (emphasis added). This determination, according to the Senate Committee Report, must be "based on an ad hoc judgment taking into consideration all of the facts and circumstances of the individual case, which is but the test of the Constitution itself (*Carroll* v. *United States*, 267 U.S. 132)." 2 U.S. Code Congressional and Administrative News, 90th Cong., 2d Sess., 1968, p. 2183.[7]

In any event, the courts below erred in upholding the legality of the fifth surveillance in the absence of a warrant or of any other independent judicial determination of the reasonableness of the surveillance. This Court should grant review to affirm the historic principle of our jurisprudence that no man, not the President or the Attorney General, is above the law. The Fourth Amendment of the Constitution requires a judicial determination at some point as to whether electronic surveillance which trenches upon the rights of an individual is justified by an overriding governmental interest.

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[7] In the Court of Appeals, it was argued that any determination of the legality of the fifth surveillance must be made on the basis of an adversary hearing with disclosure of such facts as are necessary to assess the reasonableness of the surveillance (see Brief for *Amicus Curiae*, p. 41). Since the court upheld the legality of the surveillance without *any* determination as to its reasonableness, it is unnecessary to decide at this point how such a determination should be made.

B. *The Exercise by the Attorney General of the Power to Engage in Electronic Surveillance Was Unlawful Because It Lacked the Explicit Authorization of the President.*

The Government's entire argument as to the legality of foreign intelligence surveillance is premised upon the authorization of such surveillance by the President in the exercise of his constitutional authority to conduct foreign affairs and as Commander-in-Chief of the Armed Forces. But this Court need not reach the issue of whether the President has the constitutional power to engage in electronic surveillance without regard to the Fourth Amendment's requirement of judicial supervision. This is so simply because the exercise of any such power has never in fact been explicitly authorized by the President. In the absence of such authorization, a court should hesitate to sanction conduct that trenches so heavily on the rights of citizens. *Kent* v. *Dulles*, 357 U.S. 116 (1958); *United States* v. *Rumley*, 345 U.S. 41 (1953); *Watkins* v. *United States*, 354 U.S. 178 (1957).

The Government relies entirely upon several confidential memoranda as constituting a delegation by the President to the Attorney General of his "constitutional power" to engage in warrantless electronic surveillance. The documents themselves, however, cannot support such a contention. None of the memoranda purport to authorize electronic surveillance that would otherwise violate the Fourth Amendment.

The memorandum from President Roosevelt (App. p. 84a) appears only to authorize the Attorney General to engage in wiretapping which, prior to *Katz* v. *United States*, *supra*, was not considered to be a search and seizure. Since the letter of Attorney General Clark, concurred in by President Truman (App. p. 86a), relies upon President Roosevelt's prior memorandum, it can also only

be taken as authorization to the Attorney General to engage in wiretapping. Finally, the memorandum for the heads of executive departments and agencies from President Johnson, dated June 30, 1965 (App. p. 88a), which was closest in time to the fifth surveillance, provides the least support for the Government's position. It clearly delegates to the Attorney General the power to authorize wiretapping in connection with investigations related to the national security. With respect to the "[u]tilization of mechanical or electronic devices to overhear non-telephone conversations," however, the President merely expressed a "desire that each agency conducting such investigations consult with the Attorney General to ascertain whether the agency's practices are fully in accord with the law and with a decent regard for the rights of others" (App. p. 89a). Thus, while this memorandum authorized wiretapping in conformance with existing practices, it evidences an unmistakable intention to prohibit all other electronic surveillance that is not "fully in accord with the law."

Nothing in any of these memoranda even remotely approaches an authorization by the President to the Attorney General to engage in electronic surveillance in national security investigations which would, in any other type of case, violate the Fourth Amendment to the Constitution. The issue here, then, is not whether the President has the constitutional power to authorize such surveillance, but whether he has, in fact, done so. Petitioner submits that he has not.

In a closely analogous situation, also involving a conflict between national security interests and individual rights, this Court refused to find that the President had authorized a procedure which deprived a government employee of a right to confront witnesses and evidence against him in a security clearance hearing in the absence of evidence that the President "specifically has decided that the imposed

procedures are necessary and warranted . . ." *Greene* v. *McElroy*, 360 U.S. 474, 507 (1959). Similarly, this Court has restrained the exercise of congressional investigative power which encroached upon individual rights of speech and privacy in the absence of an explicit mandate. It has concluded that "when First Amendment rights are threatened, the delegation of power to the committee must be clearly revealed in its charter * * * Protected freedoms should not be placed in danger in the absence of a clear determination by the House or the Senate that a particular inquiry is justified by a specific legislative need." *Watkins* v. *United States*, 345 U.S. 178, 198, 205 (1957). And in *United States* v. *Rumely*, 345 U.S. 41, 46 (1953), this Court held:

> "Whenever constitutional limits upon the investigative power of Congress have to be drawn by this Court, it ought only to be done after Congress has demonstrated its full awareness of what is at stake by unequivocally authorizing an inquiry of dubious limits."

The same principles are applicable to the exercise in the present case of an asserted "constitutional" investigative power of the President to engage in electronic surveillance for the purpose of gathering foreign intelligence information. Since such surveillance raises constitutional problems of the highest magnitude respecting rights protected by the First and Fourth Amendments, it should not be sanctioned by courts in the absence of "careful and purposeful consideration by those responsible for enacting and implementing our laws," *Greene* v. *McElroy*, *supra*, 360 U.S. at 507. Since it is clear that there was no explicit delegation of authority from the President to the Attorney General to engage in electronic surveillance that otherwise violated Fourth Amendment standards, this Court need go no further than to hold the unauthorized exercise of the power to have been illegal.

III.

Petitioner Has a Right to Have His Draft Status Determined by a Selective Service Board From Which Members of His Race Have Not Been Systematically Excluded and He Cannot Constitutionally Be Convicted for Failing to Submit to an Induction Order Issued by an Illegally Constituted Board.

The systematic exclusion of Negroes from draft board membership throughout the country and particularly in the South remains as an ugly blot on a society that has otherwise made such progress in rooting out the official sources of racial discrimination. It is intolerable that what is perhaps the single most powerful institution in this country should operate in a way that excludes a large minority of citizens from representation. Despite the elimination of the racially discriminatory practices that have denied black people full participation in the institutions of government, the Selective Service System continues to deny them virtually any participation in the process by which they are asked to fight, and perhaps die, for their country.

The Court of Appeals held that petitioner's contention that Negroes had been systematically excluded from the selective service draft boards that classified and ordered him to report for induction was no defense in a criminal prosecution for refusing to submit to the induction order issued by such a board. Although petitioner's *prima facie* showing that there had been systematic exclusion of Negroes from local and appeal draft boards in both Kentucky and Texas was unrebutted by the Government and unquestioned by the Court of Appeals, the court held that such draft boards, like malapportioned legislatures, possess *de facto* authority to perform all the services required of them under the Selective Service law.

Petitioner submits that this was error; that he has a constitutional and statutory right to have his draft status determined by a board from which members of his race have not been systematically excluded; and that he may vindicate this right by refusing to obey an induction order issued by an illegally constituted board.

As long ago as 1880, this Court held that the "apprehended existence of prejudice" to a Negro defendant who had been tried before a jury from which Negroes had been systematically excluded was enough, in itself, to invalidate his conviction. Thus, this Court held that the possibility that the discriminatory exclusion of Negroes from a jury may prejudice a Negro defendant requires the reversal of a conviction, even though the effects of prejudice cannot be detected or may even seem absent. See *Cassell* v. *Texas*, 339 U.S. 282 (1950); *Avery* v. *Georgia*, 345 U.S. 559 (1953). This right of a defendant not to have members of his race excluded from his jury is a guarantee that neither the substance nor the appearance of racial prejudice will interfere with his right to a fair trial, rather than merely a remedy designed to deal with cases of demonstrable prejudice in a verdict. As Mr. Justice Stewart has said, "it has never been suggested that reversal of convictions because of purposeful discrimination in the selection of grand and petit jurors turns on any showing of prejudice to the defendants," *Chapman* v. *California*, 386 U.S. 18 (1967) (concurring opinion).

The Fifth Amendment's condemnation of racial discrimination by federal officials, *Bolling* v. *Sharpe*, 347 U.S. 497 (1954), and the statutory mandate that a selective service registrant be selected for service in an "impartial manner" by a system in which "there shall be no discrimination on account of race or color . . ." (50 U.S.C. App. § 455(a)), should provide the same guarantees to the black registrant as does the Fourteenth Amendment to the black criminal

defendant. The identity in both principle and practice of a jury and a local draft board compels the conclusion that the black selective service registrant be granted the same right long accorded to the black defendant—the right to have his case considered by a body from which members of his race have not been systematically excluded.

The concept of the selective service system which places authority "in the hands of 'civilian neighbors'," Comment, *The Selective Service System,* 76 Yale L.J. 160, 161-165 (1966), and which is "founded upon the grassroots principle, in which boards made up of citizens in each community determine when registrants should be made available for military service," Hershey, *Memorandum from General Hershey,* Sen. Doc. No. 82, 89th Cong. 2d Sess. 4, is almost identical to the common law concept of a jury consisting of the "peers of every Englishman." *Strauder* v. *West Virginia, supra,* 100 U.S. at 308-309. Like a jury, the draft board exercises substantial control over the lives and liberty of its registrants. As one commentator has observed "it is the only government institution outside the criminal court with the power to condemn a man to possible death," Comment, *The Selective Service System, supra* at 160.

In making the decisions that will be of such enormous consequence to its registrants, a draft board must consider facts, credibility of witnesses and matters of public policy. Classification, which is the "key to selection" (32 C.F.R. § 1622.1(b)) is basically a fact finding procedure where wide latitude exists for the exercise of discretion. See *In Pursuit of Equity:—Who Serves When Not All Serve?* Report of the National Advisory Commission on Selective Service, 31, 184 (Table 7.6). In the present case, for example, the draft boards were required to decide whether petitioner was entitled to conscientious objector status on

the basis of whether he conscientiously opposed participation in all wars because of "a belief in a relation to a Supreme Being involving duties superior to those arising from any human relation" (32 C.F.R. § 1622.14) and whether his belief was "sincerely held," *United States* v. *Seeger*, 380 U.S. 163, 185 (1965). As with a jury in a criminal case, it is inevitable that such decisions by draft boards will be "influenced by imponderables—unconscious or conscious prejudices and preferences—and a thousand things we cannot detect and whose influence we cannot weigh," *Cassell* v. *Texas*, 339 U.S. 282, 301-02 (1959) (Clark, J., concurring). A draft board is, moreover, even more vulnerable than a jury to such influences because its wide discretion is unchecked by rules of evidence or the procedural safeguards of a criminal trial. . . .

Finally, the consideration of a registrant's case on appeal where review is limited to the documentary record before the local board (32 C.F.R. § 1626.24) cannot cure deficiencies in the local board hearing, see *United States* v. *Peebles*, 220 F.2d 114, 120 (7th Cir. 1955); and, as the court below recognized, judicial review of local boards is the "narrowest known to the law" (397 F.2d at 915; App. p. 56a). Their decisions, so long as made in conformity with the regulations, are "final even though they may be erroneous." *Estep* v. *United States*, 327 U.S. 114, 122 (1946). Thus, the decisions of local boards enjoy much the same insularity from review as do the verdicts of juries.

The "apprehended existence of prejudice" against black registrants by draft boards from which Negroes have been systematically excluded is just as great, therefore, as that by similarly selected juries against black defendants. Where long-standing notions of segregation and white supremacy have resulted in the exclusion of all Negroes from local boards, it would be ingenuous to suppose that the same

attitudes do not in turn influence the discretionary function of those very boards. Rather, as Mr. Justice Douglas has observed "the presence of an all-white Board in a racially prejudiced community may well result in blacks carrying more than their fair share of the Vietnam burden," *Sellers* v. *Laird*, 395 U.S. 950, 954 (1969) (dissenting opinion).

This Court need not look far to find examples of cases where such all-white draft boards may have been motivated by racial prejudice in their actions. In *DuVernay* v. *United States*, 394 F.2d 979, *aff'd by an equally divided court*, 394 U.S. 309 (1969), the black petitioner claimed that the chairman of the local board which had refused to reopen his classification in the exercise of its discretion under 32 C.F.R. § 1625.2 had organizational ties with the Ku Klux Klan; in *Sellers* v. *McNamara*, 398 F.2d 893 (5th Cir. 1968), *cert. denied, sub nom. Sellers* v. *Laird*, 395 U.S. 950 (1969), the petitioner's file contained statements identifying him as a civil rights activist and a "semi-professional race agitator"[8]; in *Sumrall* v. *United States*, 397 F.2d 924 (5th Cir. 1968), *cert. denied*, 393 U.S. 991 (1968), the record established that a local draft board official had been instrumental in obtaining the dismissal of certain criminal charges that were pending against petitioner, a civil rights activist, for the admitted purpose of ridding the community of him (397 F.2d at 927); and in *United States* v. *Cabbage*, —— F.2d ——, 7 CrL 2439 (6th Cir. July 31, 1970), the registrant's

[8] In *Sellers* v. *United States*, 396 U.S. 9 (1969), this Court vacated this same petitioner's criminal conviction for failure to submit to induction and remanded his case for further proceedings when the United States admitted that the FBI had monitored certain of his conversations by means of electronic surveillance, subsequently held to be illegal, *United States* v. *Sellers*, —— F. Supp. ——, 7 CrL 2327 (N.D. Ga. June 16, 1970).

file contained a secret FBI report identifying him as an active black power organizer under FBI scrutiny.[9]

Indeed, one need look no further than petitioner's own case to see how racial prejudice, conscious or unconscious, may have influenced his classification and thus his conviction. Petitioner's claim for conscientious objector status was based upon the teachings of the Lost Found Nation of Islam, an unorthodox religion which is widely misunderstood, feared and hated by white people throughout the country, but particularly in the South.[10] Especially in light

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[9] In view of the court's reversal of the registrant's conviction for refusal to submit to induction on the ground that the existence of the secret FBI report denied him due process of law, the court found it unnecessary to decide whether the defendant could challenge his induction order on the ground that his draft board lacked jurisdiction. The defendant had argued that the violation of 32 C.F.R. §1604.52(c), which requires all of the members of the local board to be residents of the area in which the board has jurisdiction, rendered the induction order void. But the court did say:

> "We find it intolerable . . . to send appellant back for reclassification by a board which the United States has stipulated to be improperly constituted under the Selective Service regulation without any practical remedy for such violation. The principle of administration of the Selective Service System by potential draftees' 'friends and neighbors' is deeply buried in the history of the Selective Service Act. Allegations of violations of the regulation in the constitution of Selective Service Boards are frequent and usually tied to suggestions that such violations are racially motivated . . ." (7 CrL at 2439.)

See also *United States* v. *Beltran*, 306 F. Supp. 385 (N.D. Cal. 1969); *United States* v. *DeMarco*, 2 SSLR 3204 (N.D. Cal. 1969). *Contra*, *United States* v. *Brooks*, 415 F.2d 502 (6th Cir. 1969); *Czepil* v. *Hershey*, 425 F.2d 251 (7th Cir. 1970); *United States* v. *Nussbaum*, 306 F. Supp. 66 (N.D. Cal. 1969).

[10] See *e.g. Wallace* v. *Brewer*, —— F. Supp. ——, 39 U.S. Law Week 2002 (M.D. Ala. 6/9/70) declaring unconstitutional Alabama's criminal anarchy statute which required Muslims and members of Muslim organizations to register with the State, and enjoining the arrest and prosecution of Muslims under the statute. The court also declared the Alabama legislature's joint resolution establishing a legislative committee to investigate and interrogate persons who may be involved in "unlawful" activities directed against the State's sovereignty unconstitutional and enjoined its application to the Muslims.

of the Department of Justice's characterization of the religion as primarily "political and racial" in its recommendation that petitioner be denied conscientious objector status, it is easy to see how an all-white draft board may have been swayed by racial bias in the denial of petitioner's exemption.[11]

The likelihood that "unconscious or conscious prejudices and preferences" of draft boards may affect black registrants is even greater in some ways than the likelihood that those of juries will affect black defendants. Because of the nature of the selective service system, discrimination in one registrant's case may well affect other registrants adversely. Thus, discrimination in favor of whites in granting deferments, for example, would adversely affect all black registrants, causing them to be reached for induction sooner than they would be otherwise. This discrimination will rarely, if ever, be exposed since appeals will not be taken by the favored registrants. See Comment, *Systematic Exclusion of Negroes from Selective Service Boards; Some Proposal For Reform*, 67 Mich. L. Rev. 756, 784, n. 117 (1969). Such a possibility is quite real, for as three Justices of this Court recently observed "it is common talk that in some areas where all-white draft boards sit, the white registrants do not even ask for deferments in order to obtain them," *Sellers* v. *Laird*, *supra*, 395 U.S. at 954.

The constitutional injury caused by draft boards from which Negroes have been excluded is not limited to the black selective service registrant. For it is undeniable that bitterness and loss of faith in the system is engendered in the entire black community by the conscription

[11] The local board was, moreover, subjected to a barrage of letters, newspaper articles and public statements, many of which reflected racial and religious prejudice against petitioner. (See App. p. 75a, note 23). Most denounced any action by the board which might exempt petitioner from the draft.

of so many of its young men in a process from which it is denied any participation. As the Court of Appeals in this case recognized:

> "The Selective Service System must not only be fair, it must likewise have the appearance of fairness. Negro draftees should be selected for military service by a system which gives Negro citizens a full participation in the selection process." (397 F.2d at 911; App. p. 44a)

And as General Hershey himself has said: "The people of this country will support a compulsory system only to the extent that they have confidence in its fairness." Hershey, *supra* at p. 4. In this vital and sensitive area, in order "to perform its high function in the best way 'justice must satisfy the appearance of justice'." *In re Murchison*, 349 U.S. 133, 136-37 (1955).

The same constitutional rule, therefore, that has been applied for almost a century where Negroes have been excluded from jury service should be followed here. Petitioner must be guaranteed that neither the substance nor the appearance of racial prejudice will affect his treatment by the selective service system.

In contending that he has a right to have his draft status determined by draft boards from which members of his race have not been systematically excluded, petitioner is not, as the Court of Appeals erroneously characterized it, invoking a right to "racially proportionate selective service boards." (397 F.2d at 912; App. p. 46a) This distinction is crucial, and this Court's language in *Hernandez* v. *Texas*, 347 U.S. 475, 482 (1954) is equally applicable here:

> "To say that this . . . revives the rejected contention that the Fourteenth Amendment requires proportional rep-

resentation of all the component ethnic groups of the community on every jury ignores the facts. The petitioner did not seek proportional representation, nor did he claim a right to have persons of Mexican descent sit on the particular juries which he faced. His only claim is the right to be indicted or tried by juries from which all members of his class are not systematically excluded—juries selected from among all qualified persons regardless of national origin or descent. To this much, he is entitled by the Constitution." (Footnotes omitted.)

Neither is the Court of Appeal's analogy of a draft board from which Negroes have been systematically excluded to a malapportioned legislature which has *de facto* authority a persuasive basis for defeating the right petitioner asserts. The potential for the unconstitutional deprivation of the life or liberty of individuals which exists in the case of draft boards is not present in the enactments of malapportioned legislatures. Moreover, like juries and unlike legislatures, draft boards act on individual cases, they apply the law to the particular facts, they act in secrecy and they possess enormous discretion, the discriminatory exercise of which in particular cases remains invisible and therefore totally immune from even minimal judicial control. Indeed, in view of the similarity of draft boards and juries, it would make as much sense to hold that juries from which Negroes have been excluded have *de facto* authority, and that their guilty verdicts cannot be challenged by black defendants. Finally, the threat of disruption and a legal vacuum that would result from the invalidation of all of the acts of a legislature, which has led to the creation of the *de facto* doctrine, *Reynolds* v. *Sims*, 377 U.S. 533, 585 (1964), is not present in the case of draft boards. The illegal composition of draft boards can be

remedied almost immediately by the appointment of Negroes to draft boards by the President upon nomination by the Governors of the states,[12] and this Court can minimize any disruption in the selective service system or the armed forces by applying its ruling prospectively only. See *Linkletter* v. *Walker*, 381 U.S. 618, 639 (1965); *Tehan* v. *Shott*, 382 U.S. 406, 416 (1966).

In *Sellers* v. *McNamara*, 398 F.2d 893 (5th Cir. 1968) *cert. denied sub nom. Sellers* v. *Laird*, 395 U.S. 950 (1969), the Court of Appeals held that its decision in petitioner's case also precluded a black registrant from seeking, by a direct attack on the jurisdiction of a draft board from which Negroes had been systematically excluded, to enjoin his induction. Thus, the court below has completely deprived the only persons with a direct and immediate stake in the integrity of the operations of the selective service system of any remedy for the serious and continuing violation of their constitutional rights.

This Court should grant review and reverse the decision of the Court of Appeals that withholds from petitioner and from countless other black selective service registrants the enjoyment of so fundamental a right. It should extend the constitutional guarantee of racial equality to an institution that, more than any other, should reflect our national ideals and goals because its only purpose is to preserve and defend them.

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[12] Under 50 U.S.C. App. §460 and 32 C.F.R. §1604.52 local draft boards are to be composed of three *or more* members nominated by the Governor and appointed by the President. Thus, additional Negro members can in every case simply be added to draft boards.

IV.

Petitioner's Conviction Should Be Vacated in Light of *Welsh* v. *United States*, 398 U. S. 333 (1970), Because the Denial of His Conscientious Objector Claim May Have Been Based on a Finding That His Objections to Participation in War Were "Political and Racial" Rather Than "Religious".

The first opinion of the court below outlines the history of the rejection of petitioner's conscientious objector claim (397 F.2d at 905-08, 918-21; App. pp. 31a-34a; 61a-66a). Following tentative rejection of petitioner's claim by the Kentucky Board of Appeals on May 6, 1966, the Department of Justice requested an F.B.I. investigation and a special hearing on the character and good faith of petitioner's objections to participation in war. At the conclusion of the hearing held August 23, 1966:

> " . . . The hearing officer reported to the Department of Justice that the registrant stated his views in a convincing manner, answered all questions forthrightly, that he was impressed by the statements, believed the registrant was of good character, morals and integrity and sincere in his objection on religious grounds to participation in war in any form. He recommended that his conscientious objector claim be sustained . . ." (397 F.2d at 918; App. p. 63a)

However, the Department of Justice opposed petitioner's claim in its advice letter of November 25, 1966, and recommended to the Board of Appeals that it not be sustained. That Board subsequently reaffirmed petitioner's 1-A classification, without providing any grounds for its decision or, indeed, any opinion whatsoever. The court below, in its first decision, found a "basis in fact" for rejection of peti-

tioner's conscientious objector claim. In its second decision it declined to reconsider this issue except to note that in its view the correctness of its previous decision was unaffected by this Court's decision in *Welsh* v. *United States*, 398 U. S. 333 (1970).

It is petitioner's contention that since the denial of his conscientious objector claim may have been based upon the Justice Department's finding that his objections to participation in war were "political and racial" rather than "religious," the *Welsh* case mandates the reversal of his conviction.

In recommending the rejection of petitioner's claim the Department of Justice made a point of finding that petitioner's objections to participation in war "insofar as they are based on the teachings of the Nation of Islam rest on grounds which are primarily political and racial." (397 F.2d at 919; App. p. 64a) There is no way to determine how much this finding influenced the Justice Department and the Appeal Board in their rejection of petitioner's conscientious objector claim. But, at a time when, under the law applicable prior to *Welsh*, a finding that a registrant's belief was not derived from "religious training and belief" was a sufficient reason for the denial of a conscientious objector claim, it cannot be doubted that the Justice Department's characterization of petitioner's objections to war as "political and racial" played a substantial role in the denial of his claim. This conclusion is reinforced by the Department's citation of *United States* v. *Kauten*, 133 F.2d 703 (2d Cir. 1943), in support of its recommendation. In *Kauten*, the court upheld the rejection of conscientious objector status although one of the grounds for rejection was the finding by the Hearing Officer, upheld and adopted by the Appeal Board and the court, that although the registrant "may be sincere in his

opposition to war, his belief does not emanate from any 'religious training and belief' but from his philosophical and political convictions." 133 F.2d at 707, n. 2. Moreover, in concluding that there was a "basis in fact" for the rejection of petitioner's claim, the court below obviously considered the non-religious source of petitioner's beliefs to have been significant, for it quoted at length from what it termed a "penetrating analysis of the beliefs of the Black Muslims," which emphasized the allegedly anti-white, anti-christian and segregationist philosophy of the Muslims. (397 F.2d at 919, n. 16; App. pp. 64a-65a)

Welsh now makes it clear that conscientious objector status cannot be denied on such grounds. Under *Welsh*, it is the strength of a registrant's opposition to war as a matter of conscience—whether his beliefs "function as a religion in . . . [his] life" (398 U.S. at 339)—rather than the source of his beliefs, that is dispositive of his conscientious objector claim. That political beliefs may satisfy the statutory definition follows from this Court's statement that:

> "We certainly do not think that § 6(j)'s exclusion of those persons with 'essentially political, sociological, or philosophical views or a merely personal moral code' should be read to exclude those who hold strong beliefs about our domestic and foreign affairs or even those whose conscientious objection to participation in all wars is founded to a substantial extent upon considerations of public policy." (398 U.S. at 342.)

Indeed, in *Welsh* the registrant characterized his conscientious opposition to war as having been formed "by reading in the fields of history and sociology," and this Court acknowledged that it was "undeniably based in part on his perception of world politics," 398 U.S. at 341, 342.

Although the Justice Department's advice letter included other findings upon which the Appeal Board's re-

jection of petitioner's conscientious objector claim might conceivably have rested, these findings find little support in the record and can provide no legitimate basis for the denial. Indeed, their lack of substance indicates that the "political and racial" source of petitioner's objections to war was perhaps the major factor in the Department's conclusion that he did not qualify for conscientious objector status.

Thus, the advice letter claimed that petitioner's objections to participation in war insofar as they were based on the teachings of the Nation of Islam "constitute objections to certain types of war in certain circumstances, rather than a general scruple against participation in war in any form." (397 F.2d at 919; App. p. 64a). But there is virtually nothing in the record to support a finding that petitioner would have been willing to engage in anything but a theocratic war. The Justice Department relied on the fact that petitioner had said:

> "If the Honorable Elijah Muhammad looked me in my face and he who I believe is directly from Allah, Almighty God, Allah, and if he looked at me and advised me, which I'm sure he wouldn't, to fight in any kind of war, if he advised me to I would." (397 F.2d at 920 n. 18; App. p. 66a)

But in *Sicurella* v. *United States*, 348 U.S. 385 (1955), this Court held that willingness to fight in a theocratic war, or a war conducted under the direction of one's god, was not inconsistent with conscientious objector status.[13] And the

[13] In *Sicurella* this Court said:

"Granting that these articles picture Jehovah's Witnesses as antipacifists, extolling the ancient wars of the Israelites and ready to engage in a 'theocratic war' if Jehovah so commands them, and granting that the Jehovah's Witnesses will fight at Armageddon, we do not feel this is enough. The test is

lower federal courts have consistently held that willingness to use force in defense of self, home and co-religionists, and to fight in a war when so commanded by one's god, was not inconsistent with the required opposition to participation in war in any form. See, *e.g., United States* v. *Hartman,* 209 F.2d 366 (2nd Cir. 1954); *United States* v. *Carroll,* 398 F.2d 651, 655 (3rd Cir. 1968); *Kessler* v. *United States,* 406 F.2d 151 (5th Cir. 1969); *Taffs* v. *United States,* 208 F.2d 329 (8th Cir. 1953), *cert. denied,* 347 U.S. 928 (1954); *Hinkle* v. *United States,* 216 F. 2d 8 (9th Cir. 1954), *cert. denied,* 348 U.S. 970 (1955); *Ashauer* v. *United States,* 217 F.2d 788 (9th Cir. 1954); *Kretchet* v. *United States,* 284 F.2d 561 (9th Cir. 1960); *Annett* v. *United States,* 205 F.2d 689 (10th Cir. 1953). Here, as in *Hartman, supra,* there is nothing in the record to show that petitioner could conscientiously participate in any flesh-and-blood war.

The Justice Department also noted passages from a Black Muslim newspaper and from a book indicating that it was the view of the Muslims that blacks should dissociate themselves from the policies of the United States; and quoted petitioner as stating Muslims were not to participate in wars on the side of "nonbelievers." But, again, there is no support for a finding that petitioner could conscientiously participate in any conceivable earthly war. Indeed, in the supplemental memorandum filed in this Court

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not whether the registrant is opposed to all war, but whether he is opposed on religious grounds, to participation in war. As to theocratic war, petitioner's willingness to fight on the orders of Jehovah is tempered by the fact that, so far as we know, their history records no such command since Biblical times and their theology does not seem to contemplate one in the future. And although the Jehovah's Witnesses may fight in the Armageddon, * * * [w]e believe that Congress had in mind real shooting wars. . . . We believe the reasoning of the Government . . . is so far removed from any possible congressional intent that it is erroneous as a matter of law." (348 U.S. at 390-91)

when the case was here previously on petition for certiorari, the Solicitor General acknowledged that the testimony at the hearing on petitioner's claim of exemption to the effect that male members of petitioner's religion were trained only in self-defense, with "no thought of actually engaging in any type of war," was never questioned. (Supplemental Memorandum for the United States, p. 4, n. 3) The Justice Department advice letter concluded that petitioner's conscientious objections were based in part upon his "expressed objection to participation in the Vietnam War." But this was supported only by quotations from petitioner to the effect that he had "no personal quarrel with the Vietcong." (397 F.2d at 920, n. 18; App. p. 67a) A lack of sympathy with the war in Vietnam is of course consistent, rather than inconsistent, with conscientious objection to all armed conflict, as the Fifth Circuit itself noted in *Kessler* v. *United States*, 406 F.2d 151, 155 (5th Cir. 1969.).[14]

A final aspect of the Justice Department advice letter upon which the Appeal Board might have relied is the implication that petitioner may not have been sincere in his conscientious objector claim. But again there is little in the record to support such a finding. As noted, *supra*, p. 47, the Hearing Officer concluded that petitioner was "sincere in his objection on religious grounds to participation in war in any form." At petitioner's sentencing the United States Attorney stated that:

> " . . . This tragedy and the sadness of having lost his title and having been convicted of a felony I think is

[14] Even assuming that there was a basis in fact for a finding that petitioner was opposed only to participation in certain wars, and that the Appeal Board relied on this ground, the instant case would be governed by this Court's disposition of the issues raised in *Negre* v. *Larsen*, 418 F.2d 908 (9th Cir. 1969), *cert. granted*, 399 U.S. 925, O.T. 1970 No. 1669 Misc., and *United States* v. *Gillette*, 420 F.2d 298 (2d Cir. 1970), *cert. granted*, 399 U.S. 925, O.T. 1970 No. 1170.

> because of his coming under the influence of the Muslim faith in the United States, which is just as much political as it is religious. I believe he is sincere in his beliefs." (Trial Transcript p. 355)

And even the Solicitor General conceded that the resumé of the F.B.I. investigation of petitioner's neighbors, friends, business associates and relatives, revealed virtually no evidence of petitioner's insincerity. (Supplemental Memorandum for the United States, p. 3)

Petitioner submits that there was no basis in fact for any of the grounds advanced by the Justice Department for rejecting petitioner's claim and his conviction should be reversed for this reason. But, even assuming that there was sufficient evidence to support some legitimate ground for rejecting petitioner's claim, the Appeal Board's decision may have been based on the "political and racial" source of petitioner's objections to participation in war which, in light of *Welsh*, is an erroneous ground as a matter of law. Especially in view of the weakness of the Justice Department's other findings, it is likely that this in fact played a substantial part in the Board's decision.

Since the Appeal Board's decision may have rested on this or some other improper ground, petitioner's conviction cannot be sustained. As this Court held in *Sicurella* v. *United States*, 348 U.S. 385 (1955), where the Department of Justice had erroneously recommended that a registrant be denied an exemption:

> " . . . we feel that this error of law by the Department, to which the Appeal Board might naturally look for guidance on such questions, must vitiate the entire proceedings at least where it is not clear that the Board relied on some legitimate ground. Here, where it is impossible to determine on exactly which grounds the

Appeal Board decided, the integrity of the Selective Service System demands at least that the Government not recommend illegal grounds." (348 U.S. at 392)

This rule has been widely followed,[15] and it has been specifically held that where the record does not indicate which of several grounds present in a Justice Department advice letter the Appeal Board relied on in denying a conscientious objector exemption, and where one of those grounds is erroneous as a matter of law, a conviction for failure to submit to induction must be reversed.[16] Consequently, petitioner's conviction should be reversed and the indictment dismissed in the interest of justice. See *United States* v. *Jakobson*, 325 F.2d 409, 417 (2nd Cir. 1963), *aff'd sub nom. United States* v. *Seeger*, 380 U.S. 183 (1965). Alternatively, since rejection of petitioner's claim may have rested on the ground that he was opposed only to certain wars, this Court should retain jurisdiction until it decides the issues raised in *Negre* v. *Larsen* and *United States* v. *Gillette*, *supra* n. 14.

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[15] See, *e.g.*, *United States* v. *Jakobson*, 325 F.2d 409 (2d Cir. 1963), *aff'd sub nom. United States* v. *Seeger*, 380 U.S. 183 (1965); *United States* v. *Broyles*, 423 F.2d 1299 (4th Cir. 1970) (*in banc*); *Ypparila* v. *United States*, 219 F.2d 465 (10th Cir. 1954); *Kretchet* v. *United States*, 284 F.2d 561 (9th Cir. 1960); *United States* v. *St. Clair*, 293 F. Supp. 337 (E.D. N.Y. 1968).

[16] See, *e.g.*, *Jakobson* and *Kretchet*, *supra* n. 15. In *Kretchet* the court said:

"We are unable to determine from the record whether the board, in refusing appellant's claim for exemption, did so because of appellant's lack of sincerity or because it believed that appellant's conscientious objections were not based upon religious training and belief, or because appellant was not opposed to war in any form, or whether such action was based upon all three grounds or on any two of them. The advice given by the Department of Justice to the appeal board that it could refuse to sustain appellant's claim for exemption on the ground that he was not opposed to war in any form, in our view, was clearly erroneous and fatally infected the adverse recommendation of the Department of Justice." (284 F.2d at 565)

V.

Petitioner's Conviction Must Be Reversed Because There Was No Basis in Fact for Denying Him a Ministerial Exemption on the Ground That He Was Also a Professional Boxer.

Petitioner was certified as a minister and alleged that he spent 90% of his time on his ministerial duties. He submitted 43 affidavits and documents containing the signatures of 3,612 people testifying to his ministerial activities. (397 F.2d at 917; App. p. 60a) The Court of Appeals found a basis in fact for rejection of his ministerial exemption claim in the fact that he had continually listed his occupation or livelihood as a professional boxer, concluding that "[H]is vocation is clearly that of a professional boxer." (397 F.2d at 918; App. p. 61a) The court made no finding, however, that petitioner did not "regularly, as a vocation, teach and preach the principles of his religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect or organization." 50 U.S.C. App. §466(g)(3) The court's apparent assumption that the mere fact that petitioner had a boxing career disqualified him from ministerial status is in violation of the long-accepted principle that a person can qualify as a minister if he satisfies objective requirements that he teach and preach regularly and act as a leader of his faith, even though he may, at the same time, practice another vocation. As noted in *United States* v. *Singleton*, 282 F. Supp. 762, 765 (S.D. N.Y. 1968):

> "... The test for a ministerial exemption is whether regularly, as a vocation, the registrant teaches and preaches the principles of his sect and conducts public worship in the tradition of his religion. Dickinson v. United States, 346 U.S. 389, 74 S.Ct. 152, 98 L.Ed. 132

(1953); 50 U.S.C. App. § 466(g). The fact that defendant may be otherwise employed fulltime, as in the case of many Jehovah's Witnesses' ministers who are not paid, is not conclusive of the issue."

See also, *e.g.*, *United States* v. *Jackson*, 369 F.2d 936 (4th Cir. 1966); *United States* v. *Stewart*, 322 F.2d 592 (4th Cir. 1963); *Wiggins* v. *United States*, 261 F.2d 113 (5th Cir. 1958). A rule such as that applied by the Court of Appeals works to the prejudice of a religion such as the Lost Found Nation of Islam, which relies on unpaid lay ministers, who of necessity must engage in some form of secular employment."

CONCLUSION

Petitioner prays that his petition for a writ of certiorari be granted.

Respectfully submitted,

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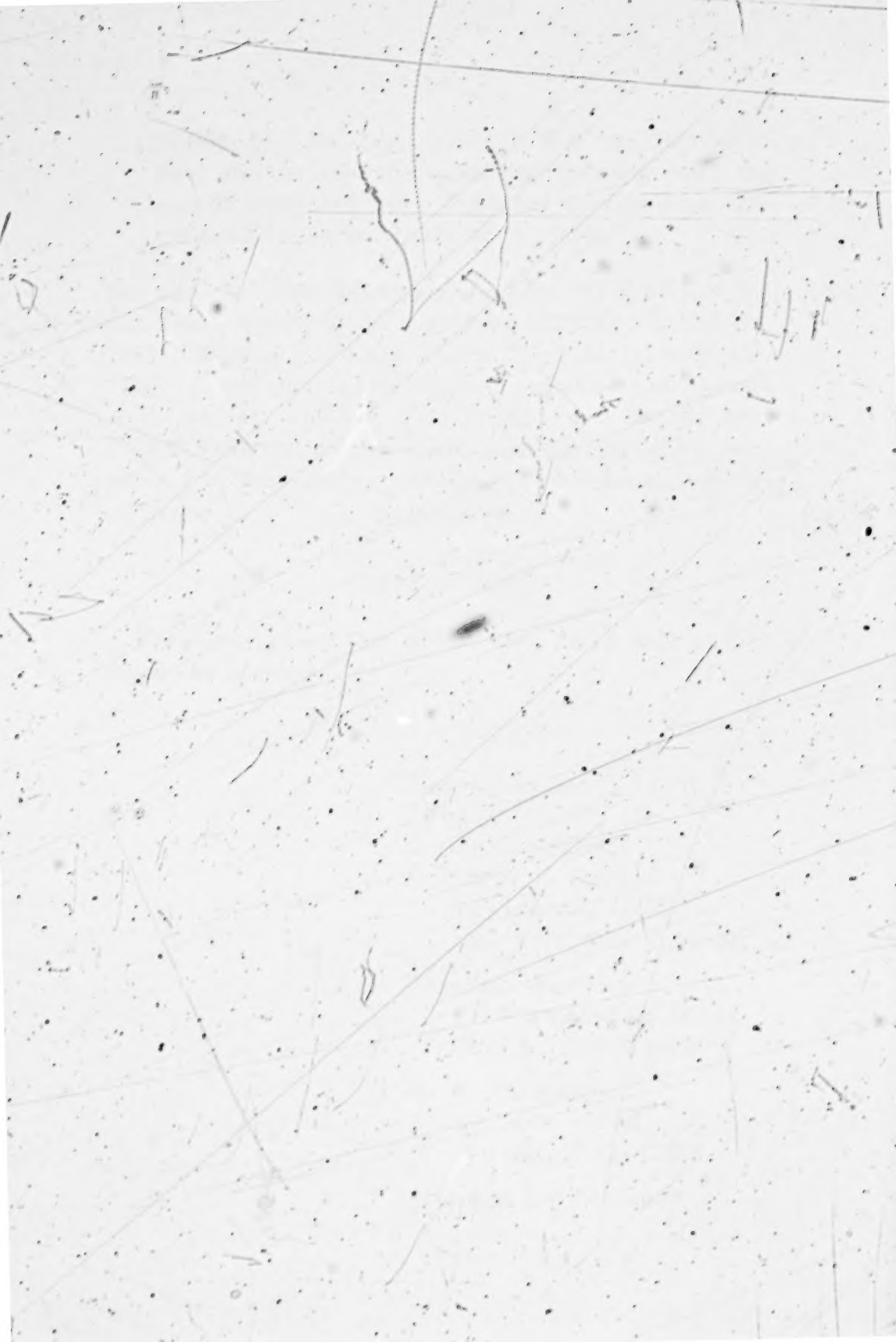
APPENDIX



Opinion of the Court of Appeals

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 28252

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CASSIUS MARSELLUS CLAY, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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(July 6, 1970)

Before WISDOM, AINSWORTH and CLARK, Circuit Judges.

AINSWORTH, Circuit Judge: This Selective Service case involves the conviction by a jury on June 20, 1967 of Cassius Marsellus Clay, Jr., also known as Muhammad Ali, former professional heavyweight boxing champion of the world, for wilfully refusing to be inducted into the Armed Forces of the United States, in violation of 50 U.S.C. App. § 462, and is

before us for the second time.[1] We affirmed the conviction on May 6, 1968, and rehearing en banc was denied June 6, 1968. See *Clay v. United States*, 5 Cir., 1968, 397 F. 2d 901.

The defendant then petitioned the Supreme Court for certiorari, and while the petition was pending before that Court, the Government revealed that there had been five telephone conversations participated in by defendant which were overheard by the Federal Bureau of Investigation by electronic wiretapping. Accordingly, the Supreme Court granted certiorari, *sub nom. Giordano v. United States*, 394 U. S. 310, 89 S. Ct. 1163 (1969), and remanded this case to the District Court for further proceedings in conformity with *Alderman v. United States*, 394 U. S. 165, 89 S. Ct. 961 (1969), to determine whether the conviction was affected by the wiretaps.

Pursuant to the Supreme Court's grant of certiorari, a lengthy hearing was then held before District Judge Joe Ingraham on June 2, 4, 5, and 6, 1969, in Houston, Texas, at which time the Court considered the FBI logs of the five wiretapped telephone conversations delivered to it in advance of the hearing by the Government. The Court then ordered that the logs of wiretapped conversations 1, 2, 3, and 4 be received in evidence and their contents fully disclosed to the defendant. As to these four logs of wiretapped telephone conversations, the Court held that the defendant had standing to assert the illegality of the surveillance and that

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[1] Defendant's request that this case, now on its second time before the Court, be heard en banc was denied on February 10, 1970.

the illegality was not challenged by the Government. The fifth log of a wiretapped conversation in which defendant participated was considered in camera by the District Judge, with related exhibits, and held to be a lawful surveillance by the FBI pursuant to the Attorney General's authorization of a wiretap for the purpose of gathering foreign intelligence.

The District Court concluded that the first four logs did not bear on the issues involved in defendant's conviction; that the defendant failed to show any relevancy of these logs to the conviction; and that the conviction must stand. The fifth wiretapped conversation which related to the gathering of foreign intelligence was held to be lawful surveillance, reasonable and necessary to the protection of the national interest.

As we have stated, logs 1, 2, 3, and 4 were made available to defendant to afford him an opportunity to show the relevance of any of these wiretapped conversations to his Selective Service law conviction. (The logs are all of the evidence which the FBI possesses of the wiretapped conversations, the tapes on which the conversations were originally recorded having been erased when the logs were typed.) The five telephone conversations were not tapped in an electronic surveillance of defendant Clay but were made in connection with surveillance of others, the defendant not having been the subject of the surveillance.

Log 1 pertained to a telephone conversation on April 22, 1965, when the telephone of Elijah Muhammad was tapped in Phoenix, Arizona. A person named Herbert called the defendant, Clay, asking him about his physi-

cal condition, prospective fights, and personal details relative to the family.[2]

Log 2 referred to another wiretap of a telephone conversation of the telephone of Elijah Muhammad on March 24, 1964. Elijah called defendant Clay, telling him that he wanted to see him about making a minister out of him when "he quit thinking of fighting all the time" and that Clay would make a better minister than a fighter.[3]

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[2]Log 1 is reproduced in full as follows:

"Herbert called, via operator, to 305-635-8893 in Miami and asked to speak to Cassius Clay. Herbert told Clay he was here in Arizona and asked how Clay was. Clay said he was fine and was down to 213 pounds. Herbert told him not to overdo it. Herbert asked him if he was going to Boston soon and he said yes, about a week and a half. Herbert said he would be down there to see him fight with his brother. Clay told him to call two days before. Clay mentioned that one boy backed out. He asked Herbert how long he was going to be out here and Herbert said he might leave tomorrow. Herbert asked how everything else was and Clay said fine. Herbert asked how his brothers were and Clay mentioned that James got put out of the temple for being out all night with women. Herbert said Clay knew what to do with a case like that, to get him a ticket and send him back where he came from. Herbert asked about . . . (probably his wife) and Clay said she had gone to Jackson with a lady friend. Herbert said he would probably call him tomorrow, to take it easy and if there was anything he could do to let him know. Clay mentioned something about having Herbert check his car when he, Herbert, got to Chicago. /Recorded/."

[3]Log 2 is reproduced in full as follows:

"Elijah took call from C. Clay. Elijah asked the time there and then said it was only 1 hr. faster than here. Elijah said he wanted to see Clay as he was

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Log 3 was another log of a wiretap of the Phoenix, Arizona, telephone of Elijah Muhammad of a telephone conversation on October 22, 1964, when a man believed to be John Ali talked to a person believed to be the defendant, Clay, giving him a message from Elijah about holding up "those TV people," who were apparently about to interview Clay.[4]

Log 4 was taken on September 4, 1964, in Atlanta, in connection with surveillance of the telephone of Dr. Martin Luther King, Jr. MLK (ostensibly Dr. King) exchanged greetings with defendant Clay, wished him well on his recent marriage, and in turn was invited to attend defendant's next championship fight. Clay also told MLK to take care of himself, that he is known world wide, and admonished him that he "should watch out for them whities," etc.[5]

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going to make a minister out of him when he quite (sic) thinking of fighting all the time. Elijah said he would make a better minister than a fighter anyhow. Elijah then said he would contact him when he had time to talk to him. Elijah also told him to keep quiet."

[4]Log 3 is reproduced in full as follows:

"Man believed to be John Ali is heard dialing out on Albert's phone for a long distance call via direct dial. He then talks to person believed to be Muhammad Ali (Clay) and says he has just talked with the Messenger and the Messenger would like for him to hold up those TV people a while since they are going to be here Saturday and he will see what they want so that he (Elijah) will know what (Clay) is going to be asked to say. John mentions that he will probably be coming there when he leaves Phoenix and should be there for Saturday and Sunday. He then gives the Muslim closing."

[5]Log 4 is reproduced in full as follows:

"Chauncey to MLK, said he is in Miami with Cassius,

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The Trial Judge held that "the logs are so totally innocuous that they could not have had any bearing on the defendant's conviction under any circumstances." The District Judge's reasons in this regard, ably expressed, with which we agree, are reproduced in pertinent part in the margin.[6]

MLK spoke to Cassius, they exchanged greetings, MLK wished him well on his recent marriage, C invited MLK to be his guest at his next championship fight, MLK said he would like to attend. C said that he is keeping up with MLK that MLK is his brother, and with him 100 — but can't take any chances, and that MLK should take care of himself, that MLK is known world wide and should watch out for them whities, said that people in Nigeria, Egypt and Ghani asked about MLK."

The Trial Judge said:

"Turning to the significance of the logs, the only manner in which the foregoing conversations were argued relevant to the defendant's conviction centered around the rejection of the defendant's conscientious objector claim. This was a plausible argument, for if the recommendation by the Department of Justice to deny the claim was based upon illegally obtained evidence, the 'basis in fact' which this court found for his classification would have been defective. Without such a 'basis of fact', the defendant could effectively challenge the jurisdiction of the draft board which classified him and ordered him to report for induction.

"The specific relevancy sought between the defendant's classification and the overheard conversations involves the statement in the Department of Justice's recommendation that 'registrant's objections to participation in war insofar as they are based upon the teachings of the Nation of Islam "rest on grounds which are primarily political and racial. These constitute objections to only certain types of war in certain circumstances, rather than a general scruple against participation in war in any form."' *Clay v. United States*, 397 F. 2d 901 (5 CA 1968). The defendant attempted to show first, that because Log 2 reflects Elijah's wish that Clay become a minister, and because Log 4

reflects Clay's reference to 'them whities' the logs would have a bearing on the Department's conclusion that the defendant's beliefs were political and racial, rather than religious. He secondly attempted to demonstrate how this information was transmitted upward through F.B.I. channels through the Department of Justice and into the recommendation, and back to the draft appeals board.

"As to the second argument, that the information was used by the Department of Justice in making its recommendation, there was positive testimony that the logs were not used at all in the preparation of the report. Only the most strained construction of the cross-examination testimony would support a contrary finding. But the court need not reach this question, for it believes, and so holds, that the logs are so totally innocuous they could not have had any bearing on the defendant's conviction under any circumstances. This is because, first, as regards Log 2, the Department of Justice's duty was to submit a recommendation concerning the defendant's status as a conscientious objector, not a minister. It is obvious that the Department could have, had it believed it was warranted, recommended that the defendant be granted a conscientious objector deferment despite the fact that he was not a minister of his religion. Moreover, even if this issue had been before the Department, it is clear that the evidence that he was not a minister up to at least March 19, 1966, is overwhelming. See discussion in *Clay v. United States*, *supra* at 915-18. Thus examining this log in a light most likely to demonstrate prejudice to the defendant, there is more than enough evidence to dispel possible taint. The conclusion that the defendant should not have been entitled to a ministerial exemption springs clearly from an 'independent origin'. *Nardone v. United States*, 308 U. S. 338 (1939).

"Defendant's attempt to link Log 4 to his conviction must similarly fail. To construe a passing reference to 'them whities' as being the Department's basis, or even partial reason, for holding the defendant's beliefs to be political and racial is completely untenable. The conversation was not a theological discussion. The common slang reference was not within a context

There was likewise no error committed by the District Court in rejecting the broad and sweeping demands for discovery by defendant's counsel of FBI files, documents, wiretapping information and tapes and transcriptions, relating to persons and conversations not participated in by defendant. All of the logs of recorded conversations of defendant were produced for his inspection except the fifth wiretap which pertained to foreign information gathering and which we will discuss later. The defendant had no right to see records or logs of conversations to which he was not a party, nor to rummage in Government files. *Alderman v. United States*, 394 U. S. 165, 185, 89 S. Ct. 961, 973 (1969); *Taglianetti v. United States*, 394 U. S. 316, 317, 89 S. Ct. 1099, 1100 (1969). It is clear from uncontradicted testimony that none of the information

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which could have had any bearing on the defendant's beliefs. A Negro not a member of the Nation of Islam would be as likely to say the same thing. In addition, if it had been in such a context, and it could be construed to be even viciously derogatory, again there was ample evidence from an independent origin before the Department to conclude that the Muslim religion holds the white race in contempt. See *Clay v. United States*, *supra* at 919 n. 16.

"As regards Logs 1 and 3, they are so totally innocuous even defendant's counsel could not point to nay specific language which could bear on the defendant's conviction. The thrust of defendant's argument concerning these logs, as well as Logs 2 and 4 was that there must have been other matters discussed by the parties which were relayed to the Department of Justice. The court does not credit this argument. The testimony was clear that the original tapes were erased immediately after the logs were typed, and that the logs received in evidence were the only ones prepared. The individuals who monitored the conversations in Phoenix testified that they communicated no other information to anyone."

obtained in the five wiretapped telephone conversations was used in the FBI investigation of defendant's conscientious objector claim, or in the preparation of the adverse Department of Justice recommendation made in connection with defendant's original request for conscientious objector classification?[7] In our view the Trial Court exercised "informed discretion, good sense, and fairness," *Alderman, supra*, 394 U. S. at 185, 89 S. Ct. at 973, in denying defendant's discovery demands and we perceive no sound reason for interfering with his decision.[8]

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[7]Defendant was mailed a copy of the adverse recommendation on November 29, 1966. *See* 397 F. 2d at 906.

[8]The District Judge, in his memorandum opinion, said in this regard:

> In Alderman v. United States, supra, the Court said that '(n)one of this means that any petitioner will have an unlimited license to rummage in the files of the Department of Justice. Armed with the specific records of overheard conversations and with the right to cross examine the appropriate officials in regard to the connection between those records and the case made against him, a petitioner may need or be entitled to nothing else. Whether this is the case or not must be left to the informed discretion, good sense, and fairness of the trial judge.' Id. at 185. And in Taglianetti v. United States, 394 U. S. 316 (1969), the Court said that '(n)othing in Alderman v. United States, Ivanov v. United States, or Butenko v. United State, ante, p. 165, requires an adversary proceeding and full disclosure for every issue raised by an electronic surveillance. . . . Here the defendant was entitled to see a transcript of his own conversations and nothing else. He had no right to rummage in government files.' Id. at 317. Despite the foregoing, the defendant's counsel insistently requested what would be, in essence, a full-scale inquiry into F.B.I. practices. The court does not believe that anything was shown which would warrant such an inquiry. Defendant had ample opportunity to demonstrate first, that the logs

The fifth wiretap was not disclosed to defendant because the District Court found that the surveillance was lawful, having been authorized by the Attorney General, for the purpose of obtaining foreign intelligence information. The Supreme Court has not yet decided whether electronic surveillance for the purpose of gathering foreign intelligence information is constitutionally permissible, *Giordano v. United States*, *supra*, 394 U. S. at 314, 89 S. Ct. at 1165, 1166 (1969), though Mr. Justice White has expressed the view that such surveillance does not violate the Fourth Amendment. *See Katz v. United States*, 389 U. S. 347, 364, 88 S. Ct. 507, 517 (1967).

Moreover, in *Giordano*, *supra*, 394 U. S. at 314, 89 S. Ct. at 1165, Mr. Justice Stewart in a concurring opinion stated the following in regard to the mandate of *Alderman*, *supra*, for further hearing and the procedure to be followed in a criminal case where wiretap-

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contained prejudicial material, and second, that the material was communicated to and was used by the Department of Justice in making its recommendation. Had he established the first, perhaps more extensive discovery would have been in order. But the defendant should not be permitted such broad discovery to attempt to prove transmittal of the information if he cannot first show that the information could have been, even in part, relevant to his conviction.

"It might be added that Taglianetti v. United States, supra, intimates that the district court could, in some circumstances, make the determination that wiretap evidence is innocuous in an in camera inspection. This is, the court believes, such a case. Nevertheless, an adequate opportunity was given the defendant to prove relevance in an adversary proceeding. The proceeding was as extensive as Alderman requires. He failed to show the requisite relevancy, and the conviction must stand."

ping information relative to a defendant had been obtained.

> "We have nowhere indicated that this determination cannot appropriately be made in *ex parte, in camera* proceedings. 'Nothing in Alderman v. United States, Ivanov v. United States, or Butenko v. United States, 394 U. S. 165, 89 S. Ct. 961, 22 L. Ed. 2d 176, requires an adversary proceeding and full disclosure for resolution of every issue raised by an electronic surveillance.' Taglianetti v. United States, 394 U. S. 316, 89 S. Ct. 1099, 22 L. Ed. 2d 302."

An in camera examination of the fifth log and a description of the premises which were the subject of the surveillance, together with the Attorney General's express authorization to the FBI to make the surveillance, was accordingly made by the Trial Judge. It has also been made by the three judges of this panel. From this examination we agree that the log of the fifth wiretapped telephone conversation (1) was authorized by the Attorney General in writing to the FBI; (2) that it was not made pursuant to a surveillance of defendant but rather of others, and the premises were identified; (3) that it was made in connection with obtaining foreign intelligence information; (4) that the Executive Branch of the Government has properly and reasonably requested that the log not be published or disclosed to the defendant or the public because "it would prejudice the national interest to disclose the particular facts concerning this surveillance other than to the court *in camera*" (see affidavit of

Attorney General Mitchell); and (5) its contents do not in any manner bear upon the issues involved in defendant's draft law violation case, and in no way has this wiretap prejudiced defendant, helped build a case against him, or assisted in bringing about his conviction.

Defendant and amicus contend that the Supreme Court's decision in *Alderman, supra,* requires an adversary hearing and mandates that all wiretapped information of defendant's conversations be furnished to him, including the fifth log pertaining to foreign intelligence gathering; that the District Court erred in failing to disclose the fifth log to him and in not holding a hearing thereon to determine if the wiretap tainted defendant's conviction; that full disclosure is required by the Constitution and the Bill of Rights, and that section 605 of the Federal Communications Act of 1934, 47 U.S.C. § 605, bars any use of wiretap in a criminal prosecution.

Under the circumstances here, publication of the fifth log to defendant is unwarranted and would be contrary to the national interest, having been obtained in foreign intelligence surveillance. The Court's in camera examination of the fifth log establishes to our satisfaction that the contents of the wiretap were not germane to any issue in this criminal prosecution and conviction. There has been no use against defendant of the information gained by the Government by the fifth wiretap and the information there obtained would not have been of assistance to the prosecutor in constructing a case against defendant. There is no indication that

the information was or could be used in any way against defendant.

Determination of this case requires that we balance the rights of the defendant and the national interest. The Attorney General, who acts here for the President and Commander-in-Chief, has submitted his affidavit that the fifth wiretap was maintained "for the purpose of gathering foreign intelligence information" and the Attorney General opposed disclosure at the hearing because "it would prejudice the national interest to disclose particular facts concerning this surveillance other than to the court." The fifth log was submitted by the Government for an in camera examination by the Court, which has been made both here and in the District Court. The rights of defendant and the national interest have thus been properly safeguarded. Further judicial inquiry would be improper and should not occur. It would be "intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret." *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U. S. 103, 111, 68 S. Ct. 431, 436 (1948). We, therefore, discern no constitutional prohibition against the fifth wiretap.

Section 605 of Title 47, U.S.C., is a general prohibition against publication or use of communications obtained by wiretapping, but we do not read the section as forbidding the President, or his representative, from ordering wiretap surveillance to obtain foreign intelligence in the national interest. When Congress enacted Title III of the Omnibus Crime Control and Safe Streets

Act of 1968, 18 U.S.C. § 2511(3) thereof, it specifically denied any section 605 limitation, as follows:

> "(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measure as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable and shall not be otherwise used or disclosed except as is necessary to implement that power."

This is a clear statement by Congress itself relative to the scope of the section 605 provisions which are not to limit the President's constitutional prerogative to obtain foreign intelligence information.

We reiterate that no use of the fifth log was made in this case against defendant. It played no part in his conviction and our in camera scrutiny thereof thoroughly convinces us that defendant was not prejudiced thereby. As the Supreme Court said in *Taglianetti v. United States*, 394 U. S. 316, 317, 318, 89 S. Ct. 1099, 1101 (1969), "Under the circumstances presented here, we cannot hold that 'the task is too complex, and the margin for error too great, to rely wholly on the *in camera* judgment of the trial court.' *Alderman v. United States, supra*, 394 U. S., at 182, 89 S. Ct., at 971." No one would seriously doubt in this time of serious international insecurity and peril that there is an imperative necessity for obtaining foreign intelligence information, and we do not believe such gathering is forbidden by the Constitution or by statutory provision, including 47 U.S.C. § 605.

We are urged to reconsider the issues decided by us in our original decision in this case, 397 F. 2d 901, but we decline to do so.[9] We declined en banc recon-

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[9]We have, however, examined the recent holding of the Supreme Court in Welsh v. United States, ——— U.S. ———, ——— S. Ct. ——— (No. 76, October Term 1969, decided June 15, 1970), to determine if that decision affects the present case. In our view, it does not. The Supreme Court granted Welsh a conscientious objector status because of "deeply and sincerely" held ethical or mortal beliefs which imposed on Welsh "a duty of conscience to refrain from participating in any war at any time." The Court found that Welsh's beliefs functioned "as a religion in his life," thereby entitling him to a "religious" conscientious objector exemption under Section 6(j) of the Universal Military Training and Service Act (50 U.S.C. App. § 456(j)), ——— U. S. at ———, ——— S. Ct. at ———. Section 6(j) grants an exemption from service in the Armed Forces to a registrant "who, by reason of religious training and belief,

sideration of our original decision and further refused en banc consideration of this second hearing in this case. Our prior decision is the law of the case on the issues decided there, unless they are affected by the wiretapped telephone conversations.[10] In our view, the defendant's conviction was not so affected and accordingly the judgment of conviction should be

AFFIRMED.[11]

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is conscientiously opposed to participation in *war in any form.*" (Emphasis supplied.) As we pointed out in our original opinion in this case, the Department of Justice recommendation (made in connection with the conscientious objector investigation), to the Kentucky Board of Appeals, stated that Clay's beliefs insofar as they are based upon the teachings of the Nation of Islam "rest on grounds which are primarily political and racial. These constitute objections *to only certain types of war in certain circumstances, rather than a general scruple against participation in war in any form.*" (Emphasis supplied.) *See* 397 F. 2d at 918-919. The Kentucky Board of Appeals thereafter continued the I-A classification of Clay. That there was also a "basis in fact" for the numerous local board, state appeal boards (Kentucky and Texas) and Presidential Appeal Board I-A classifications of Clay, thereby including an adverse determination of the question of Clay's basic sincerity, is amply shown and detailed in our original opinion and in the record to which reference is made. *See* 397 F. 2d at 918-921.

[10] Defendant has cited the Presbyterian Ch. v. Mary E. B. Hull Mem. Pres. Ch., 393 U. S. 440, 89 S. Ct. 601 (1969), in support of its contention that the Department of Justice's analysis that the teachings of the Nation of Islam are primarily political and racial and that this interpretation violates the establishment clause of the First Amendment. We reject this argument for reasons which we have discussed in full in our original opinion in this case relative to Muslim tenets. *See* 397 F. 2d at 918-921.

[11] We have carefully considered all of the additional contentions of defendant, but find them to be without merit, and accordingly they are rejected.

Order Denying Petition for Rehearing and Petition for Rehearing *En Banc*

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 28252

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CASSIUS MARSELLUS CLAY, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(August 19, 1970)

Before WISDOM, AINSWORTH and CLARK, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it; (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is also DENIED.

Opinion of the District Court

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA, (
Plaintiff,)

VS. (CR. NO. 67-H-94

CASSIUS MARSELLUS CLAY, JR.,)
a/k/a Muhammad Ali, (
Defendant.)

JULY 14, 1969

Memorandum:

The defendant, Cassius Marsellus Clay, Jr., was convicted by a jury in this court on June 20, 1967, for unlawfully failing to submit to induction into the armed forces of the United States. The conviction was affirmed. Clay v. United States, 397 F.2d 901 (5 CA 1968). The Supreme Court granted certiorari and the case is again before this court on remand from the Supreme Court, Giordano v. United States, 394 U.S. 310 (1969), for further proceedings in conformity with Alderman v. United States, 394 U.S. 165 (1969). It was revealed while the defendant's petition for certiorari was pending that the defendant had been a party to five telephonic conversations which

had been electronically overheard by agents of the Federal Bureau of Investigation. Remand was held necessary, as it was in Alderman, for the district court to determine whether the defendant's conviction was tainted by the information obtained as a result of the electronic [883] surveillance. The Court in Alderman set out the procedure the district court was to follow in making that determination.

Conforming therewith, this court conducted hearings on June 4, 5 and 6, 1969, and, at the Court's request, briefs were filed by counsel. After thoroughly considering the evidence adduced at the hearing, the transcript of those pleadings, and the attorneys' briefs, the court enters this memorandum decision, the following to constitute findings of fact and conclusions of law as ordered in Alderman.

I.

The prosecution delivered to the court, in advance of the hearing, logs of five telephone conversations in which the defendant was one of the conversing parties. It was asserted by the government, and the court credits the assertion as true, that these logs were the only ones found in the F.B.I. files in which the defendant's conversations were overheard. In no instance was the defendant's telephone monitored; it was the other party to the conversation whose telephone was placed under surveillance. It is clear, however, and it is unchallenged by the government, that the defendant has standing to challenge the legality of the surveillance, and to seek suppression of any illegally obtained evidence.

Upon receipt of the logs of the five conversations, the court, at the request of the government, placed four of them (hereinafter referred to as logs 1, 2, 3 and 4) under a protective order. The order provided that the logs would be available to the defendant and his attorneys for inspection, but that they would be prohibited from disclosing the contents to anyone without permission from the court. However, it became apparent that it would be impossible to conduct a public

hearing and explore the relevance of the logs in light of the protective order. The order was therefore dissolved, and the logs were admitted into evidence. The fifth log, which will be discussed later, was not disclosed to the defendant and was not [884] received into evidence, although it was read and considered and will be subject to review upon appeal herefrom.

As was outlined in Giordano v. United States, supra, the court must decide first, whether the defendant "has standing to assert the illegality of the surveillance or of the introduction of its fruits," and second, whether the surveillance was unlawful, for if it was lawful, disclosure and further proceedings would be rendered unnecessary. The first issue has been answered in the affirmative, and the second, the illegality of the surveillance, was never challenged by the government. Since the surveillance was acknowledged to be illegal, the ultimate issue to be decided by the court is "whether the evidence against the (defendant) . . . grew out of his illegally overheard conversation. . . . The question as stated in Wong Sun v. United States, 371 U.S. 471, 488 (1963), is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" Alderman v. United States, supra, at 180-81.

The logs of the four conversations admitted into evidence are as follows:

Log 1 (GX-102)

It was shown that this conversation, which took place on April 22, 1965, was overheard via a wiretap placed on the telephone of Elijah Muhammad in Phoenix, Arizona.

> "Herbert called, via operator, to 305-635-8893 in Miami and asked to speak to Cassius Clay. Herbert told Clay he was here in Arizona and asked how Clay was. Clay said he was fine and was down to 213 pounds. Herbert told him not to overdo it. Herbert asked him if he was going to Boston soon and he said

yes, about a week and a half. Herbert said he would be down there to see him fight with his brother. Clay told him to call two days before. Clay mentioned that one boy had backed out. He asked Herbert how long he was going to be out here and Herbert said he might leave tomorrow. Herbert asked how everything else was and Clay said fine. Herbert asked how his brothers were and Clay mentioned that Jaines got put out [885] of the temple for being out all night with women. Herbert said Clay knew what to do with a case like that, to get him a ticket and send him back where he came from. Herbert asked about . . . (probably his wife) and Clay said she had gone to Jackson with a lady friend. Herbert said he would probably call him tomorrow, to take it easy and if there was anything he could do to let him know. Clay mentioned something about having Herbert check his car when he, Herbert, got to Chicago. /Recorded/."

Another summary of the same conversation, marked GX-106, was also admitted. It differs from Log 1 only in minor detail and need not be quoted here.

Log 2 (GX-103)

Taken on March 24, 1964, this was also a result of the Elijah Muhammad wiretap.

"Elijah took call from C. Clay. Elijah asked the time there and then said it was only 1 hr. faster than here. Elijah said he wanted to see Clay as he was going to make a minister out of him when he quite (sic) thinking of fighting all the time. Elijah said he would make a better minister than a fighter anyhow. Elijah then said he would contact him when he had time to talk to him. Elijah also told him to keep quiet."

Another summary of this conversation, marked GX 107 and received in evidence, is almost identical to the foregoing, and need not be quoted here.

Log 3 (GX-104)

Another log from the Phoenix wiretap on the telephone of Elijah Muhammad, taken on October 22, 1964:

> "Man believed to be John Ali is heard dialing out on Albert's phone for a long-distance call via direct dial. He then talks to person believed to be Muhammad Ali. (Clay) and says he has just talked with the Messenger and the Messenger would like for him to hold up those TV people a while since they are going to be here Saturday, and he will see what they want so that he (Elijah) will know what he (Clay) is going to be asked to say. John mentions that he will probably be coming there when he leaves Phoenix and should be there for Saturday and Sunday. He then gives the Muslim closing."

Log 4 (GX-105)

This log was taken on September 4, 1964, in Atlanta, Georgia. The telephone under surveillance belonged to Dr. Martin [886] Luther King, Jr.

> "Chauncey to MLK, said he is in Miami with Cassius. MLK spoke to Cassius, they exchanged greetings, MLK wished him well on his recent marriage, C invited MLK to be his guest at his next championship fight, MLK said he would like to attend; C said that he is keeping up with MLK, that MLK is his brother, and with him 100% but can't take any chances, and that MLK should take care of himself, that MLK is known world wide and should watch out for them whities; said that people in Nigeria, Egypt and Ghani asked about MLK."

Because the defendant suggested that this log did not contain all of the conversation with Dr. King that he was entitled to receive, the government submitted to the court for an in camera examination the original log from which Log 4 was prepared. The court has read it, and concludes that the defendant's assertion is without merit. If there was any further conversation

between Dr. King and the defendant, it was not recorded in the log; the defendant is not entitled to see a log of a conversation to which he was not a party.

Turning to the significance of the logs, the only manner in which the foregoing conversations were argued relevant to the defendant's conviction centered around the rejection of the defendant's conscientious objector claim. This was a plausible argument, for if the recommendation by the Department of Justice to deny the claim was based upon illegally obtained evidence; the "basis in fact" which this court found for his classification would have been defective. Without such a "basis in fact," the defendant could effectively challenge the jurisdiction of the draft board which classified him and ordered him to report for induction.

The specific relevancy sought between the defendant's classification and the overheard conversations involves the statement in the Department of Justice's recommendation that "registrant's objections to participation in war insofar as they are based upon the teachings of the Nation of Islam 'rest on grounds which are primarily political and racial. These constitute objections to only certain types of war in certain circumstances, rather than a general scruple [887] against participation in war in any form.'" Clay v. United States, 397 F.2d 901 (5 CA 1968). The defendant attempted to show first, that because Log 2 reflects Elijah's wish that Clay become a minister, and because Log 4 reflects Clay's reference to "them whities," the logs would have a bearing on the Department's conclusion that the defendant's beliefs were political and racial, rather than religious. He secondly attempted to demonstrate how this information was transmitted upward through F.B.I. channels, through the Department of Justice and into the recommendation, and back to the draft appeals board.

As to the second argument, that the information was used by the Department of Justice in making its recommendation, there was positive testimony that the logs were not used at all in the

preparation of the report. Only the most strained construction of the cross-examination testimony would support a contrary finding. But the court need not reach this question, for it believes, and so holds, that the logs are so totally innocuous they could not have had any bearing on the defendant's conviction under any circumstances. This is because, first, as regards Log 2, the Department of Justice's duty was to submit a recommendation concerning the defendant's status as a conscientious objector, not a minister. It is obvious that the Department could have, had it believed it was warranted, recommended that the defendant be granted a conscientious objector deferment despite the fact that he was not a minister of his religion. Moreover, even if this issue had been before the Department, it is clear that the evidence that he was not a minister up to at least March 19, 1966, is overwhelming. See discussion in Clay v. United States, supra, at 915-18. Thus, examining this log in a light most likely to demonstrate prejudice to the defendant, there is more than enough evidence to dispel possible taint. The conclusion that the defendant should not have been entitled to a ministerial exemption springs clearly from an "independent origin." Nardone v. United States, 308 U.S. 338 (1939).

[888] Defendant's attempt to link Log 4 to his conviction must similarly fail. To construe a passing reference to "them whities" as being the Department's basis, or even partial reason, for holding the defendant's beliefs to be political and racial is completely untenable. The conversation was not a theological discussion. The common slang reference was not within a context which could have had any bearing on the defendant's beliefs. A Negro not a member of the Nation of Islam would be as likely to say the same thing. In addition, if it had been in such a context, and it could be construed to be even viciously derogatory, again there was ample evidence from an independent origin before the Department to conclude that the Muslim religion holds the white race in contempt. See Clay v. United

States, supra, at 219, n. 16.

As regards Logs 1 and 3, they are so totally innocuous even defendant's counsel could not point to any specific language which could bear on the defendant's conviction. The thrust of defendant's argument concerning these logs, as well as Logs 2 and 4, was that there must have been other matters discussed by the parties which were relayed to the Department of Justice. The court does not credit this argument. The testimony was clear that the original tapes were erased immediately after the logs were typed, and that the logs received in evidence were the only ones prepared. The individuals who monitored the conversations in Phoenix testified that they communicated no other information to anyone. The evidence also substantiates, without the need for further discovery, that no other information from the Atlanta wiretap was communicated to any person in the Department of Justice. As to the notation on the Atlanta wiretap log, AT 1379-S*, the court credits the government's claim that this number was the number assigned to the telephone surveillance, and does not refer to any F.B.I. employee.

In Alderman v. United States, supra, the Court said that "[n]one of this means that any petitioner will have an unlimited license to rummage in the files of the Department of Justice. [889] Armed with the specific records of overheard conversations and with the right to cross-examine the appropriate officials in regard to the connection between those records and the case made against him, a petitioner may need or be entitled to nothing else. Whether this is the case or not must be left to the informed discretion, good sense, and fairness of the trial judge." Id. at 185. And in Taglianetti v. United States, 394 U.S. 316 (1969), the Court said that "[n]othing in Alderman v. United States, Ivanov v. United States, or Butenko v. United States, ante, p. 165, requires an adversary proceeding and full disclosure for every issue raised by an electronic surveillance. . . . Here the defendant was entitled to see a

transcript of his own conversations and nothing else. He had no right to rummage in government files." Id. at 317. Despite the foregoing, the defendant's counsel insistently requested what would be, in essence, a full-scale inquiry into F.B.I. practices. The court does not believe that anything was shown which would warrant such an inquiry. Defendant had ample opportunity to demonstrate first, that the logs contained prejudicial material, and second, that the material was communicated to and was used by the Department of Justice in making its recommendation. Had he established the first, perhaps more extensive discovery would have been in order. But the defendant should not be permitted such broad discovery to attempt to prove transmittal of the information if he cannot first show that the information could have been, even in part, relevant to his conviction.

It might be added that Taglianetti v. United States, supra, intimates that the district court could, in some circumstances, make the determination that wiretap evidence is innocuous in an in camera inspection. This is, the court believes, such a case. Nevertheless, an adequate opportunity was given the defendant to prove relevance in an adversary proceeding. The proceeding was as extensive as Alderman requires. He failed to show the requisite relevancy, and the conviction must stand.

[890] II.

As noted earlier, "a finding by the District Court that the surveillance was lawful would make disclosure and further proceedings unnecessary." Giordano v. United States, supra, at 313. The court held with regard to the fifth wiretapped conversation that the surveillance was lawful. The log of that conversation, along with the authorization for the wiretap, was sealed and returned to the United States Attorney.

Whether the Attorney General's authorization of a wiretap for the purpose of gathering foreign intelligence information violates the Fourth Amendment is an issue of extreme gravity. It has never been decided by the Supreme Court, and this court

will not speculate on the direction in which the Justices will lean. See concurring opinion of Justice Stewart in Giordano v. United States, supra, at 314-15. The court is aware, of course, of the abuses possible should an Attorney General authorize extensive wiretaps under the guise of collecting foreign intelligence information. But the court also recognizes that such investigations are, in many instances, vital to the maintenance of national security.

The court agrees with the government's counsel that in determining whether to employ wiretapping, the President or the Attorney General must make a judgment based on foreign policy considerations. It would not be feasible for the executive to attempt to bring to the court's attention all the factual and policy considerations supporting the decision. Moreover, it is the executive, not the judiciary, which alone possesses both the expertise and the factual background to assess the reasonableness of such a surveillance. From a purely practical standpoint, it is ridiculous to place on a United States Commissioner the burden of deciding what is and what is not a threat to national security. The court does not believe the judiciary should question the decision of the executive department that such surveillances are reasonable and necessary to the protection of the national interest.

[891] For the foregoing reasons, the defendant's motions to dismiss or set aside the verdict of the jury, sentence and indictment, and for a new trial, will be denied.

The defendant will present himself before the court for sentencing on Thursday, July 24, 1969, at 9:30 A.M.

Done at Houston, Texas, on this, the 14th day of July, A.D. 1969.

/s/ Joe Ingraham

United States District Judge

Prior Opinion of the Court of Appeals

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 24991

CASSIUS MARSELLUS CLAY, JR.,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Southern District of Texas.

(May 6, 1968.)

Before COLEMAN, AINSWORTH and DYER, Circuit Judges.

AINSWORTH, Circuit Judge: "It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it." Chief Justice Edward Douglass White, *Selective Draft Law Cases*, 245 U. S. 366, 378, 38 S. Ct. 159, 161 (1918).

Cassius Marsellus Clay, Jr., also known as Muhammad Ali, heavyweight professional boxing champion

of the world, was convicted after trial by jury on an indictment charging violation of 50 U.S.C. App. § 462, for knowingly and wilfully refusing to report for and submit to induction into the armed forces of the United States. Clay's draft case has been through practically every phase of selective service procedure, beginning with the date he registered on April 18, 1960, until he was ordered to report but declined to submit to induction on April 28, 1967, and was thereafter convicted by jury trial held on June 19, 20, 1967. On four different occasions he was classified 1-A (Available for military service) by his local board, twice by two different appeal boards (in Kentucky and Texas) and once by the National Selective Service Appeal Board (the Presidential Appeal Board). In every instance the vote of the boards was unanimous.

There has been no administrative process which Clay (Ali) has not sought within the Selective Service System, its local and appeal boards, the Presidential Appeal Board and finally the federal courts, in an unsuccessful attempt to evade and escape from military service of his country. Being entirely satisfied that he has been fairly accorded due process of law, and without discrimination, we affirm his conviction.

The pertinent but lengthy chronology of his case follows:

Prior Opinion of the Court of Appeals

April 18, 1960—Clay (Ali) registered for selective service with Local Board No. 47, Louisville, Kentucky.

March 9, 1962—Registrant was classified 1-A by Local Board No. 47, Louisville, Kentucky.

March 26, 1964—Registrant was classified 1-Y as a result of a physical examination, as being not acceptable for induction in the armed forces and not qualified under current standards.

February 17, 1966—Registrant was reclassified 1-A by Local Board No. 47, Louisville, Kentucky, after having been considered by the Examining Station in accordance with current regulations and found fully acceptable for induction.

February 18, 1966—1-A classification notice was mailed to registrant. Clay (Ali) was furnished Special Form for Conscientious Objector (SSS Form 150).

February 28, 1966—Special Form for Conscientious Objector was filed by registrant with the local board. This was the first time such a claim had been made. Registrant requested a personal appearance before the local board in reference to the change of his classification from 1-Y to 1-A.

March 17, 1966—The local board granted a personal appearance before it by registrant and again classified him 1-A.

Prior Opinion of the Court of Appeals

March 28, 1966—Registrant appealed the 1-A classification to the Kentucky Appeal Board.

May 6, 1966—The Kentucky Appeal Board reviewed the file de novo and tentatively determined that the registrant was not entitled to the 1-O, conscientious objector or lower, classification. The complete file was referred to the Department of Justice for an advisory recommendation as provided by Selective Service Regulations (32 C.F.R. § 1626.25), and an investigation by the Federal Bureau of Investigation was requested by the Department.

August 23, 1966—Registrant filed a letter request with Local Board No. 47, Louisville, Kentucky, for reclassification to IV-D as a minister of the Lost Found Nation of Islam (Black Muslims).

August 23, 1966—The FBI investigation having been made, a special hearing was held in Louisville, Kentucky, to consider registrant's conscientious objector claim. The Hearing Officer reported his belief that the registrant was sincere in his conscientious objector claim.

November 25, 1966—The Department of Justice, Office of Legal Counsel, Conscientious Objector Section, recommended to the Kentucky Appeal Board that the request of the registrant for conscientious objector status be denied. Registrant was mailed a copy of the recommendation on November 29, 1966.

January 10, 1967—The Kentucky Appeal Board denied the requested conscientious objector claim and notified the registrant that he was classified 1-A.

January 12, 1967—Local Board No. 47, Louisville, Kentucky, reviewed the registrant's complete file but declined to reopen his classification. The board agreed unanimously that registrant was not entitled to the IV-D ministerial exemption.

January 19, 1967—Pursuant to the written request of General Lewis B. Hershey, the National Director of Selective Service, Local Board No. 47, Louisville, Kentucky, reopened and considered anew the classification, including the claim for ministerial classification, and after re-examining the registrant's file again classified him 1-A, and notice of classification was mailed to registrant.

January 26, 1967—Registrant appealed the 1-A classification and requested that the Appeal Board for the Southern District of Texas (the place of his current domicile at Houston, Texas) hear the appeal.

February 15, 1967—The Appeal Board for the Southern District of Texas classified registrant 1-A and returned his file to Kentucky on February 20, 1967, after finding that no new information had been submitted relating to his consoientious objector claim, and having considered and rejected his claim for ministerial exemption.

February 24, 1967—The National Director of Selective Service, General Lewis B. Hershey, appealed

the registrant's classification to the National Selective Service Appeal Board (the Presidential Appeal Board). (See 32 C.F.R. § 1627.1 for the authority of the National Director to do so.) Registrant could not file such an appeal because the regulations (32 C.F.R. § 1727.3) require that one or more members of the appeal board dissent from the classification before a registrant has such a right to file the appeal himself.

March 6, 1967—The Presidential Appeal Board unanimously voted to classify the registrant 1-A, and a copy of "Minutes of Action Upon Appeal to the President" was forwarded to the local board on March 14, 1967.

March 14, 1967—Local Board No. 47, Louisville, Kentucky, ordered the registrant to report for induction on April 11, 1967, at Louisville, Kentucky.

March 24, 1967—Registrant requested a transfer of induction to Houston, Texas, which was granted by Local Board No. 61 at Houston.

March 29, 1967—Local Board No. 61, Houston, Texas, ordered registrant to report to it on April 28, 1967, for delivery to the induction station.

April 28, 1967—Registrant reported for but declined to submit to induction on the grounds of his religious beliefs as a minister of the Islam Religion.

May 8, 1967—Registrant was indicted for violation of 50 U.S.C. App. § 462.

June 19, 20, 1967—Registrant was tried and convicted by a jury of the selective service violation for refusing to submit to induction, and sentenced to five years' imprisonment and a fine of $10,000.[1] This is his appeal from the conviction and sentence.

Clay (Ali) has no prior criminal record and no previous charges or convictions for crime, other than minor traffic violations.

The registrant has, therefore, exhausted every administrative remedy provided by Selective Service. He has also fully pursued his rights in the United States courts in a vain attempt to stop his induction before his trial and conviction in the present case.

In Kentucky, registrant, who is a Negro, filed suit in the United States District Court for the Western District of Kentucky to prevent his induction into the armed forces. In his suit he sought a declaration that the Universal Military Training and Service Act is unconstitutional on its face and as applied because of "systematic exclusion" of Negroes from membership on draft boards; also, for an injunction to restrain all draft boards in Kentucky from performing their functions until Negroes were appointed to boards in proportion to their ratio to the population. He sought to enjoin further classification and induc-

[1] The District Judge said in this regard:

"Well, I am going to impose the maximum penalty because under the rules at the end of an appeal if it is reversed, why, of course it is nil. If it is affirmed it is then subject to motion to reduce, and I find that we get into problems when clemency is given at the time of sentencing and then following an affirmance there is another petition for clemency." (R. 277)

tion of Negroes until this had been accomplished. The District Court denied relief, holding that no evidence had been submitted and no contention made that Clay (Ali) had been deprived of any right of appeal or other administrative process of Selective Service; that there was no evidence that he had personally been singled out and subjected to punitive action or other discriminatory treatment by the System. The District Court said that the issues were not appropriate for judicial review until the registrant either submitted to induction or refused to submit to induction, at which time the issues could be raised either by habeas corpus or in defense to a criminal prosecution. The District Court also held that except in rare circumstances, not present here, it was not the function of the judiciary to enjoin the operation or enforcement of the Universal Military Training and Service Act. A stay of injunction pending appeal was refused. *Muhammad Ali v. Breathitt*, D. C., W. D. Ky., 1967, 268 F. Supp. 63. Registrant petitioned the Sixth Circuit for leave to appeal and for temporary restraining order pending appeal, which was denied, the Court taking cognizance of the District Judge's denial of a certification that immediate appeal was warranted and the denial of an order staying proceedings (Unpublished opinion, 6 Cir., Docket No. 17787, March 28, 1967.) The Sixth Circuit, on April 17, 1967, denied registrant's application for an order staying orders of the District Court and for an injunction pending appeal. (Unpublished opinion, 6 Cir., Docket No. 17834.) On the same day, the Supreme Court denied registrant's application for stay of the

order of the United States District Court for the Western District of Kentucky, for injunction pending appeal and denied leave to file a petition for mandamus. *Muhammad Ali v. Gordon*, 386 U. S. 1002, 87 S. Ct. 1365 (1967). Rehearing was denied by the Supreme Court on April 24, 1967. 386 U. S. 1027, 87 S. Ct. 1388. On the same day, the Supreme Court also denied petition for writ of certiorari to the Sixth Circuit. *Muhammad Ali v. Gordon*, 386 U. S. 1018, 87 S. Ct. 1376.

In Texas the registrant filed a similar suit in the United States District Court, Southern District of Texas, raising substantially the same legal contentions as those in the Kentucky suit. The District Court (Judge Hannay) denied relief and ruled that the selectee's remedy could only arise after the final step toward military induction and should he refuse this step, his remedy would lie in whatever defense he claimed in the criminal prosecution. The District Judge said that a second remedy available was that of habeas corpus in the event the selectee should take the final step toward military induction while claiming that his induction was illegal, unconstitutional and void. *Muhammad Ali v. Connally*, D. C., S. D. Tex., April 28, 1967, 266 F. Supp. 345.

The registrant appealed from the District Court decision. He also filed application to stay and for interim injunction pending appeal, which was denied by the District Judge. He then petitioned Judge John R. Brown of the Fifth Circuit (now Chief Judge) for in-

junction pending appeal, which was denied,[2] and the matter was then referred to a panel of this Court (Judges Gewin, Coleman and Simpson), which also denied the motion for stay and injunction pending appeal. (Unpublished order, 5 Cir., Docket No. 24714, May 11, 1967.)

After refusing induction on April 28, 1967, appellant filed another suit in the United States District Court, Southern District of Texas, on April 29, 1967, for similar relief, which was denied on May 1, 1967 by Judge Seals for substantially the same reasons assigned by Judge Hannay in the prior case, the District Judge being of the opinion that the subsequent refusal of induction did not suffice to create a remedy for injunctive relief. At the same time an application for a stay and for an interim injunction to the District Court pending appeal was also denied. A panel of the Fifth Circuit (Judges Gewin, Coleman and Simpson), on May 11, 1967, thereafter denied a motion for stay or

[2] Judge Brown in detailed reasons for his refusal (unpublished opinion) said in part:

"I conclude that on traditional principles the equities—which includes the public interest—argue against such relief. I would not intimate what the intrinsic merits are—but I am convinced that the chances of success on appeal are so remote that I ought not to grant it.

. . . .

"Balancing these factors I do not think that the courts should intervene to test, on the application of every registrant, the statutory validity of the process. The law will not finally ever compel the unlawful conscription of a citizen or permit criminal punishment for failure to submit to unlawful orders. That inconvenience, hardship or risk may be suffered if and until Congress prescribes other remedies—one of the perils of civilization and citizenship in a nation which calls on its citizens for the protection of its national and international interests."

injunction pending appeal of Judge Seals' decision. (Unpublished order, 5 Cir., Docket No. 24723.)

Appellant, having been indicted on May 8, 1967 for the selective service violation, then petitioned the Fifth Circuit for a writ of prohibition to restrain the impending trial, which petition was denied by a panel of this Court (Judges Tuttle, Washington and Simpson) on May 15, 1967. (See unpublished order, 5 Cir., in Docket No. 24750.)[3]

We summarize the principal questions for decision as follows:

1) Was the selective service induction order to appellant invalid because of alleged systematic exclusion of Negroes from draft boards?

2) Did the District Court err in refusing to grant appellant's request for the production of certain documentary and other evidence?

3) Was there a basis in fact for the denial to appellant of a ministerial exemption?

4) Was there a basis in fact for the denial to appellant of conscientious objector status?

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[3] The appeal to the Fifth Circuit from Judge Hannay's ruling (Docket No. 24714) was dismissed for want of prosecution on July 28, 1967; and the appeal from the ruling of Judge Seals (Docket No. 24723) was dismissed for want of prosecution on September 5, 1967.

5) Did the proceedings as a whole, selective service and judicial, constitute a prohibited bill of attainder?

I.

THE ALLEGED SYSTEMATIC EXCLUSION OF NEGROES FROM SELECTIVE SERVICE BOARDS

The Selective Service System is based on the constitutional provision which grants to Congress the power "To raise and support Armies . . . . " U. S. Const. art I, § 8(12). The Universal Military Training and Service Act provides (50 U.S.C. App. § 460(b)(3)) that the President is authorized to create civilian local boards and appeal boards. Each local board shall consist of three or more members to be appointed by the President from recommendations made by the respective governors of each of the states. No member of any local board shall be a member of the armed forces but each member shall be a citizen residing in the local board jurisdiction. Appeal boards shall also be composed of citizens who are not members of the armed forces and consist normally of five members appointed by the President upon recommendation of the governor. The appeal board shall be a composite board representative of the activities of its areas and shall include one member from labor, one member from industry, one physician, one lawyer and, where applicable, one member from agriculture. (32 C.F.R. § 1604.22.)

Thus the racial composition of the local and appeal boards about which appellant complains; because of

the absence of a proportion of Negroes in accordance with their ratio to the population, results from appointment by the President upon recommendation of the governor of each state. The appointments are therefore federal, not state.

There is also a National Selective Service Appeal Board (sometimes called the Presidential Appeal Board) composed of three members who are appointed by the President from citizens who are not members of the armed forces. This board acts for the President himself, being vested with the functions and duties of the President provided by the Act (50 U.S.C. App. § 460(b)(3)), which reads in pertinent part as follows:

> "The President, upon appeal or upon his own motion, shall have power to determine all claims or questions with respect to inclusion for, or exemption or deferment from training and service under this title, and the determination of the President shall be final."

This board shall be in all respects independent of the Director of Selective Service. (32 C.F.R. § 1604.6 (a), (b), (c).) It was stipulated in the present record that one of the three members of the Presidential Appeal Board was a Negro. However, there was no Negro member on any of the local or appeal boards which considered appellant's draft case.

According to the report of the National Advisory Commission on Selective Service (the Marshall Com-

mission), in Kentucky, only 0.2% of 641 local board members is Negro, though 7.1% of the total population is Negro. In Texas, only 1.1% of local board members is Negro, though 12.4% of the total population is Negro. In the City of Louisville, the total population (1964) is 389,044, of which the white population is 310,717 and the Negro population 78,245, or 21% of the total population.[4] The Jefferson County, Kentucky, total population (1960) number 610,947, of which there are 532,057 whites and 78,350 Negroes, or 12.8% of the total population. In Harris County, Texas, of a total population of 1,243,158, 19.81%, or 246,351, is Negro.[5]

According to the Marshall Commission Report, the unequal percentage of Negroes on draft boards was not peculiar to Kentucky, Texas or the South, but the imbalance was nationwide. Only in the District of Columbia and in Delaware were there substantial percentages of Negroes on the boards. In twenty-three states, there were no Negroes on draft boards, the Report stated.[6]

Nevertheless the Marshall Commission said significantly in its report, "There is no evidence that the

[4] Appellant's brief asserts the Negro population of Louisville (1964) to be 78,327 and the percentage of Negroes to be 20.1%—a slight error. The difference is, of course, not significant. See Special Censuses, Series P-28, No. 1377, Louisville, Kentucky (United States Department of Commerce).

[5] Appellant in brief supplies other calculations from the record as follows: 9.60% of the total population of the Western District of Kentucky is Negro; 14.25% of the total population of the Southern District of Texas is Negro.

[6] For example, there were no Negroes on draft boards in such states as Indiana, Iowa, Kansas, Maine, Minnesota, New Jersey and Rhode Island.

variability of the Selective Service System leads to any systematic biases against poor people, or Negroes, insofar as the final proportion of men serving in the Armed Forces is a measure of this."

As a direct result of the Marshall Commission Report, the President in his message to the Congress on Selective Service dated March 6, 1967, instructed the Director of the Selective Service System to work with the governors "to assure that all local boards are truly representative of the communities they serve and to submit periodic reports on the progress in this area."

The Universal Military Training and Service Act in its congressional declaration of policy declares that the obligations and privileges of serving in the armed forces should be shared generally in accordance with a system of selection which is "fair and just" (50 U.S.C. App. § 451(c)). The Act further provides (50 U.S.C. App. § 455(a)) that "The selection of persons for training and service . . . shall be made in an impartial manner, under such rules and regulations as the President may prescribe, from the persons who are liable for such training and service and who at the time of selection are registered and classified, but not deferred or exempted: *Provided*, That in the selection of persons for training and service under this title . . . , and in the interpretation and execution of the provisions of this title . . . , there shall be no discrimination against any person on account of race or color: . . . ."

The Selective Service Regulations (32 C.F.R. § 1622.1(d)) provide, "In classifying a registrant there shall be no discrimination for or against him because of his race, creed, or color, or because of his membership or activity in any labor, political, religious, or other organization. Each such registrant shall receive equal justice."

Appellant argues that the quoted statistics evidence racial exclusion in the composition of draft boards, in violation of the Fifth Amendment. He cites *United States v. Jefferson County Board of Education*, 5 Cir. 1966, 372 F. 2d 836, 837, aff'd on rehearing, en banc, 380 F. 2d 385 (1967), cert. denied, sub nom. *Board of Education of the City of Bessemer v. United States*, 389 U. S. 840, 88 S. Ct. 77 (1967), where this Court said that it has frequently relied on percentages in jury exclusion cases and in other civil rights cases for evidence of deliberate discrimination against Negroes. He concludes that if systematic exclusion of Negroes is constitutionally barred in the composition of juries, their exclusion in the Selective Service System likewise infringes his rights and requires a holding that draft boards, such as those in Kentucky and Texas which considered appellant's case, have no jurisdiction over appellant or in fact over any Negro. Thus he argues that the local boards have acted beyond their jurisdiction and may not act as to that class of registrants (including appellant) against whom it is claimed the appointing process has discriminated. Appellant concedes that considerable progress in rectifying this disparity in the several states has been

made since the President's March 6, 1967, message to Congress on Selective Service, but contends that Negroes should not be selected in the future until the alleged systematic exclusion of members of that race from draft boards has ceased.

Appellant likens his classification and induction into the armed forces to a criminal prosecution because, as in a criminal prosecution, the Government restrains a registrant of his liberty and may even cause his death by sending him into combat.

No court has held, so far as we can determine, nor do we here, that a Negro registrant for selective service is entitled to be classified and inducted by a selective service board composed of a percentage of Negro members which the Negro population bears to the total population, or that a board lacks jurisdiction of a registrant unless so constituted. No question is raised that the boards which considered appellant's classification were not regularly and properly constituted under appointment by the President, recommended by the governor. We do not justify the failure to include substantial numbers of Negroes on such boards. The Selective Service System must not only be fair, it must likewise have the appearance of fairness. Negro draftees should be selected for military service by a system which gives Negro citizens a full participation in the selection process. The Marshall Commission affirmed the necessity of greater participation by Negroes who are underrepresented as a class on local draft boards.

The Commission said that the Negro's position in the military manpower situation is in many ways disproportionate, even though he does not serve in the armed forces out of proportion to his percentage to the population. The President in his March 6, 1967, message to Congress said in this regard: "The Nation's requirement that men must serve, however, imposes this obligation: that in this land of equals, men are selected as equals to serve. A just nation must have the fairest system that can be devised for making that selection:" We concur with these remarks to the fullest. But nothing we have said justifies exemption from service in the armed forces for Negro registrants.

It is undeniable, as appellant contends, that conscription deprives an individual of his liberty and may even take his life. But we cannot properly compare the military draft to a criminal prosecution. There is no stigma attached to wearing the military uniform of the United States. To the contrary, it is a badge of the highest honor. Service under the flag of our country cannot properly be likened to imprisonment in a penitentiary. A proud nation with a long tradition of valor and bravery on the battlefield, with vivid memories in modern times of distant places where Americans have fought and died to preserve freedom, some with unusual names, such as Chateau-Thierry, Normandy, Iwo Jima and Khe Sanh, would never permit a comparison so odious. It is the same willingness of Americans to sacrifice their lives in the military service of the country which has made it

possible to establish the United States as a free nation, and which has successfully warded off the encroachments of its enemies. "The knowledge that military service must sometimes be borne by—and imposed on—free men so their freedom may be preserved is woven deeply into the fabric of the American experience." President Johnson, Message on Selective Service to the Congress, March 6, 1967.

The Government argues—and we agree—that a draft board system which does not have a sufficiently representative number of Negro members is comparable to a malapportioned legislature. The acts of such a legislature are not invalid and the laws which it passes are not null and void. The acts of a malapportioned legislature or local or county commission or board are acts of a de facto political authority and valid despite their failure to be apportioned in accordance with *Baker v. Carr*, 369 U. S. 186, 82 S. Ct. 691 (1962), and *Avery v. Midland County, Texas*, ... U. S. ...., 88 S. Ct. 1114 (1968).

Nor is appellant's argument meritorious that composition of draft boards is similar to that of grand and petit juries. The right to trial by jury has specific constitutional authority. However, nothing in the Constitution or the Universal Military Training and Service Act requires racially proportionate selective service boards. It is not difficult to understand the reasons which support the prior rulings of the Supreme Court and this Court in the jury selection cases where convictions have been set aside for

failure to have representative numbers of Negroes on jury venires. See *Whitus v. State of Georgia*, 385 U. S. 545, 87 S. Ct. 643 (1967); *Rabinowitz v. United States*, 5 Cir., 1966, 366 F. 2d 34; *Mobley v. United States*, 5 Cir., 1967, 379 F. 2d 768. The boards are administrative agencies with specific duties, many of them purely ministerial, which are provided for by the Act and Selective Service Regulations. A jury's verdict arrived at by secret deliberation has a finality which is not at all applicable to selective service classification and induction. As we shall see, draft board appeals are considered de novo and are not judicial proceedings.

The war powers of Congress to raise and support armies are constitutionally authorized and are of paramount public importance because they directly involve the protection and preservation of the nation itself. In this vital and sensitive area it behooves the judiciary to recognize the imperative necessity for the maintenance of the national integrity as upheld by the military forces of the United States. The Universal Military Training and Service Act provides that "every male citizen of the United States" between certain ages shall register and be subject to induction in the armed forces of the United States. Exemptions from service, such as for conscientious objectors or ministers of religion, are matters of legislative grace. *United States v. Mohammed*, 7 Cir., 1961, 288 F. 2d 236, 242; *Parrott v. United States*, 9 Cir., 1966, 370 F. 2d 388, 391. It has been long established that there is no constitutional right to exemp-

tion from military service by virtue of conscientious objection or religious calling. *Wood v. United States*, 5 Cir., 1967, 373 F. 2d 894, 900, reversed on other grounds, 389 U. S. 20, 88 S. Ct. 3 (1967); *George v. United States*, 9 Cir., 1952, 196 F. 2d 445, 449. These exemptions do not spring from the Constitution but from the Congress. *George v. United States, supra.* The Supreme Court said in *Jacobson v. Massachusetts*, 197 U. S. 11, 29, 25 S. Ct. 358, 362 (1905), that despite the liberty secured by the Fourteenth Amendment a person "may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country, and risk the chance of being shot down in its defense."

It will be recalled that there were seven different occasions on which appellant was classified 1-A; four by his local board, twice by two different appeal boards in Kentucky and Texas, and once by the Presidential Appeal Board. The appeals in each instance were considered de novo.[7] "It is universally held that the Appeal Board considers matters of classification *de novo* and its classification is one of first instance, not a mere affirmance or reversal of the Lo-

[7] As to the appeal boards, the Regulations provide (32 C.F.R. § 1626.26):

"(a) The appeal board shall classify the registrant, giving consideration to the various classes in the same manner in which the local board gives consideration thereto when it classifies a registrant.

"(b) Such classification of the registrant shall be final, except where an appeal to the President is taken: . . . ."

"The state appeal boards make a de novo classification." Comment, *The Selective Service*, 76 Yale L. J. 160, 171 (1966).

cal Board, and that any . . . prejudice on the local level is cured by a fair consideration on the appeal." *DeRemer v. United States*, 8 Cir., 1965, 340 F. 2d 712, 719; *United States v. Van Hook*, 7 Cir., 1960, 284 F. 2d 489, 491; *Ayers v. United States*, 9 Cir., 1956, 240 F. 2d 802, 809, cert. denied, 352 U. S. 1016, 77 S. Ct. 563 (1957); *Davis v. United States*, 8 Cir., 1953, 203 F. 2d 853. The action of the board of appeals completely supersedes the action of the local board in classifying appellant although the classification is the same. *Cramer v. France*, 9 Cir., 1945, 148 F. 2d 801; *United States v. Moore*, 7 Cir., 1954, 217 F. 2d 428, 431, 432. If the local board erred, the error was cured by the de novo action of the appeal board. *United States v. Chodorski*, 7 Cir., 1956, 240 F. 2d 590, 593.

The appeal to the Presidential Appeal Board was also de novo.[8] Any error or invalidity in the selective service procedures up to and including the Presidential Appeal Board was cured by de novo consideration by that board which acted in the place and stead of the President himself. One third of the membership of the Presidential Appeal Board (one of three) was a Negro, which is obviously a greater proportion than Negroes bear to the total population. The deci-

[8] The powers of the President upon an appeal (and necessarily of the Presidential Appeal Board which acts for him) are as follows (50 U.S.C. App. § 460(3)):

> ". . . power to determine all claims or questions with respect to inclusion for, or exemption or deferment from training and service under this title . . . , and the determination of the President shall be final."

"There is no personal appearance before the President's Board, which makes a de novo classification based on the materials in the registrant's file." Comment, *The Selective Service*, 76 Yale L. J. 160, 172 (1966).

sion of the board was unanimous that appellant should be classified 1-A, which action thereby cleared the way for his induction into the armed forces. Nowhere in the record in this case or in appellant's brief do we find any specific charge or evidence of discrimination against appellant because he is a Negro. There are conclusory allegations that the absence of Negroes from local and appeal boards (other than the Presidential Appeal Board) in and of itself establishes discrimination. But we have been unable to find any evidence which shows in the slightest particular that the treatment accorded Clay (Ali) by any board or member thereof was different from that given to any other registrant. Afforded every procedure known to the Act and the regulations, and an appeal to the Presidential Appeal Board to which he was not specifically entitled, appellant's refusal of induction and subsequent trial and conviction by a jury are the result of his own voluntary choice to violate the law of the land.

The contentions of appellant were given final and conclusive consideration by the highest tribunal within the System, a board entirely independent of the Director of Selective Service, and the decision was the same—that appellant be classified 1-A, thereby making him available for induction into the armed forces. The action of the Presidential Appeal Board, a board in which there was no racial imbalance, and the subsequent refusal of appellant to be inducted, are, without more, sufficient to affirm the conviction.

II.

DENIAL OF APPELLANT'S REQUEST FOR PRODUCTION OF CERTAIN DOCUMENTARY AND OTHER EVIDENCE

Prior to trial appellant sought discovery of certain evidence in connection with his allegation of systematic exclusion of Negroes from the System and racial discrimination against him. He moved the Court under Rule 16, Federal Rules of Criminal Procedure, that the Government produce all records of the National Advisory Commission on Selective Service showing the composition of draft boards in Texas and Kentucky and the details of the number of Negroes and whites classified for service and exempt or deferred from induction, other records of the Mark Clark Commission on Selective Service to the House Armed Forces Committee, all of the files of Local Board No. 47, Louisville, Kentucky, relating to registrants who claimed and were granted exemptions, minutes of the meetings of the Presidential Appeal Board and Texas Appeal Board, the entire draft board file of appellant, and the White House transcript of a press conference by the President on March 9, 1967. He also moved to take the oral depositions of Lieutenant General Lewis B. Hershey, the National Director of Selective Service, Washington; United States Representative L. Mendell Rivers, Chairman, House Armed Services Committee, Washington; the members of the National Selective Service Appeal Board and the members of the Texas Ap-

peal Board. General Hershey was requested to bring with him his notes about a public statement on January 31, 1967, in which he predicted appellant would not be deferred. Representative Rivers was requested to bring the notes of his public statement on August 25, 1966, relative to a statement that if Cassius Clay was deferred by the Louisville Board, "You watch what happens in Washington." The members of the National Selective Service Appeal Board were to bring all records and to be examined about the minutes of meetings and communications between them relating to appellant's hearing. The same information was to be obtained from the members of the Texas Appeal Board. Appellant also moved to take the depositions by written interrogatories of the Governors of Texas and Kentucky, the Selective Service Directors of those states, General Hershey, members of the National Selective Service Appeal Board, members of Local Board No. 47, members of the Texas Appeal Board and Representative Rivers. Another application sought issuance of subpoenas duces tecum to Lyndon B. Johnson, President of the United States;* Ramsey Clark, Attorney General; General Hershey; the Chairman of Local Board No. 47, Louisville, Kentucky; the Chairman of the Texas Appeal Board; the Director of the National Selective Service Appeal Board, Representative Rivers and the Executive Director of the National Advisory Commission on Selective Service, whereby these witnesses were to produce certain books, papers and documents in their possession called for by the subpoenas.

* The request for a subpoena to the President was subsequently withdrawn by appellant's counsel.

A mass of material was, therefore, sought by these discovery techniques. The Trial Judge held a hearing, received briefs and permitted oral argument as to whether the requested discovery should be granted. Appellant's basic contention was that the information sought was necessary to prove systematic exclusion of Negroes in the Selective Service System and that there was lack of procedural due process in the handling of his case. The Government objected to the requested discovery and moved to quash the subpoenas duces tecum, contending that what appellant sought was to put the Selective Service System itself on trial by a congressional-type general investigation. The Government argued against permitting such an investigation of the System, and also that the material sought was irrelevant to any issue which might arise in the criminal trial.

The Government further contended that defense counsel was attempting to explore into the minds and mental processes of the administrative officers named in the subpoenas, was engaging in a "fishing expedition," and that much of the matter sought, though irrelevant, could be obtained from other sources. The District Court refused to order production of the discovery, documentary and other evidence sought by appellant. Nevertheless, much of it found its way into the record at the trial.[10] The

[10] In the present record are the following: Registrant's entire Selective Service file, the Report of the National Advisory Commission on Selective Service showing the percentages of Negroes on local boards throughout the states of the nation, Minutes of the Presidential Appeal Board relating to appellant's case, and the President's Message to the Congress on Selective Service dated March 6, 1967.

measure of discovery permitted by the Rules of Criminal Procedure is not intended to be as broad as in a civil case. Fishing expeditions are the order of the day in a civil action but not in a criminal case for in the latter only limited discovery is permitted. *United States v. Sermon*, D. C., W. D. Mo., 1963, 218 F. Supp. 871, 872, 873. A judge should, therefore, be sensitive to the rules of discovery, which are far more restrictive governing criminal discovery. *Campbell v. Eastland*, 5 Cir., 1962, 307 F. 2d 478, 487. Application for relief under Rule 16, Federal Rules of Criminal Procedure, is a matter within the sound discretion of the Court and the controlling test is whether there has been an abuse of discretion. *Gevinson v. United States*, 5 Cir., 1966, 358 F. 2d 761, 766; *Beatty v. United States*, 5 Cir., 1967, 377 F. 2d 181, 185, reversed on other grounds, 389 U. S. 45, 88 S. Ct. 234 (1967). We believe the District Judge's ruling was correct and that it was made in the exercise of reasonable discretion in the management of the proceeding. What the defense actually sought was to place the Selective Service System itself on trial by a broad, general, though vague and indefinite, investigation into its activities and procedures. Most of the evidence requested was immaterial to any defense which could be raised by appellant at his trial. The statistical information about the representation of Negroes on draft boards generally as well as in Kentucky and Texas was available from other sources and is in the record. It would have been grossly improper to place the members of the Presidential Appeal Board and the Texas Appeal Board

on the witness stand to determine from them what their reasons were for the selective service classification which they gave to appellant in this case. There was, therefore, no error in the ruling of the Trial Judge.

III.

DENIAL OF THE MINISTERIAL EXEMPTION

Scope of Review. In considering the propriety of appellant's classification, and the denial of a ministerial exemption and conscientious objector status, we must keep in mind that the Act provides that decisions of the local boards are final. (50 U.S.C. App. § 460(b)(3).) In the leading and much cited case of *Estep v. United States*, 327 U. S. 114, 122, 66 S. Ct. 423, 427 (1946), the Supreme Court said:

> "The provision making the decisions of the local boards 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for

the classification which it gave the registrant."

Therefore, the scope of review of local board decisions in draft cases is very limited and the range of review is the narrowest known to the law. *Matyastik v. United States*, 5 Cir., 1968, ... F. 2d .... [No. 24269, February 12, 1968]; *Blalock v. United States*, 4 Cir., 1957, 247 F. 2d 615.[11] In *Blalock* the Fourth Circuit said:

> "The 'clearly erroneous' rule applied in equity appeals has no place here, nor even the 'substantial evidence' rule of the Administrative Procedure Act, 5 U.S.C.A. § 1009. Congress gave the courts no general authority of revision over draft board proceedings, and we have authority to reverse only if there is a denial of basic procedural fairness or if the conclusion of the board is without any basis in fact. Witmer v. United States, 348 U. S. 375, 75 S. Ct. 392, 99 L. Ed. 428; Goff v. U. S., 4 Cir., 135 F. 2d 610."

The courts do not sit as super draft boards, substituting their judgments on the weight of the evidence, nor should they look for substantial evidence

[11] "The registrant who wants to take his case to court will find little relief from that quarter. Indeed, he will find it difficult to obtain review at all. The courts have allowed review only by habeas corpus after induction and defense to a criminal prosecution for failure to report for induction." (citing *Witmer v. United States*, 348 U. S. 375, 377, 75 S. Ct. 392 (1955) in support of the text) Comment, *The Selective Service*, 76 Yale L. J. 160, 172 (1966).

to support such determinations. *Tamarkin v. United States*, 5 Cir., 1958, 260 F. 2d 436, 437; *Wood v. United States*, 5 Cir., 1967, 373 F. 2d 894, reversed on other grounds, 389 U. S. 20, 88 S. Ct. 3 (1967); *Dickinson v. United States*, 346 U. S. 389, 396, 74 S. Ct. 152, 157 (1953); *Witmer v. United States*, 348 U. S. 375, 75 S. Ct. 392 (1955).

In recent cases we have consistently supported the "basis in fact" test in connection with the classification of draft registrants by local boards. See *Wood v. United States*, 5 Cir., 1967, 373 F. 2d 894, reversed on other grounds, 389 U. S. 20, 88 S. Ct. 3 (1967); *Greer v. United States*, 5 Cir., 1967, 378 F. 2d 931; *Foster v. United States*, 5 Cir., 1967, 384 F. 2d 372; *Jones v. United States*, 5 Cir., 1968, ... F. 2d .... [No. 24565, January 17, 1968]; *Matyastik v. United States*, 5 Cir., 1968, ... F. 2d .... [No. 24269, February 12, 1968].[12]

The Ministerial Exemption. We turn now to the question of the denial of a ministerial exemption to appellant who claims to be a minister of the Lost Found Nation of Islam (Black Muslims). The Act provides that regular or duly ordained ministers of religion shall be exempt from service. (50 U.S.C. App. § 456(g).)

> "The term 'regular minister of religion' means one who as his customary vocation preaches and teaches the principles of re-

[12] For a further discussion of the narrow scope of review in draft cases, see Comment, *Fairness and Due Process Under the Selective Service System*, 114 Penna. L. Rev. 1015, 1019 (1966).

> ligion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister." (50 U.S.C. App. § 466(g), (2).)

See also 32 C.F.R. § 1622.43 (Selective Service Regulations) which places a regular minister of religion in Class IV-D. Most important, the registrant bears the burden of clearly establishing a right to the ministerial exemption and the board has no affirmative duty to ascertain whether or not the registrant qualifies for the exemption. *Wood v. United States*, 5 Cir., 1967, 373 F. 2d 894, reversed on other grounds, 389 U. S. 20, 88 S. Ct. 3 (1967).

In *Dickinson v. United States*, 346 U. S. 389, 394, 395, 74 S. Ct. 152, 156, 157 (1953), a ministerial exemption case, the Supreme Court said:

> "The ministerial exemption, as was pointed out in the Senate Report accompanying the 1948 Act, 'is a narrow one, intended for the leaders of the various religious faiths and not for the members generally.' S. Rep. No. 1268, 80th Cong., 2d Sess. 13. Certainly all members of a religious organization or sect are not entitled to the exemption by reason of their membership, even though in their belief each is a minister. Cf. Cox v. United States, 1947, 332 U. S. 442, 68 S. Ct. 115, 92 L. Ed. 59. On the other hand, a legitimate minister

> cannot be, for the purposes of the Act, unfrocked simply because all the members of his sect base an exemption claim on the dogma of its faith. That would leave a congregation without a cleric. Each registrant must satisfy the Act's rigid criteria for the exemption. Preaching and teaching the principles of one's sect, if performed part-time or half-time, occasionally or irregularly, are insufficient to bring a registrant under § 6 (g). These activities must be regularly performed. They must, as the statute reads, comprise the registrant's 'vocation.' And since the ministerial exemption is a matter of legislative grace, the selective service registrant bears the burden of clearly establishing a right to the exemption."

The test, therefore, is whether a registrant, as a vocation, regularly, not occasionally, teaches and preaches the principles of his religion. There must be regularity of religious activities, a ministerial vocation rather than an avocation, and a recognized standing as a minister to a congregation or leader of a group of lesser members of his faith. *Wiggins v. United States*, 5 Cir., 1958, 261 F. 2d 113; *Fitts v. United States*, 5 Cir., 1964, 334 F. 2d 416; *Wood v. United States*, 5 Cir., 1967, 373 F. 2d 894, reversed on other grounds, 389 U. S. 20, 88 S. Ct. 3 (1967); *Greer v. United States*, 5 Cir., 1967, 378 F. 2d 931; *Foster v. United States*, 5 Cir., 1967, 384 F. 2d 372; *Jones v. United States*, 5 Cir., 1968, ... F. 2d ....

[No. 24565, January 17, 1968]; *Matyastik v. United States*, 5 Cir., 1968, ... F.2d .... [No. 24269, February 12, 1968].

Appellant was certified as a minister by the National Secretary of the Lost Found Nation of Islam and by its leader, Elijah Muhammad. He contends that he spends 90% of his time on his ministerial duties. He submitted 43 affidavits and documents said to contain the signatures of 3,612 people testifying to his ministerial activities. Finally he states that there was no evidence in his file upon which a "basis in fact" could be found to support his 1-A classification by the board. We are unable to agree with his statements or contentions. The file indicates that appellant joined his religious sect in January 1964. He has apparently earned his living as a professional boxer for a number of years and became professional heavyweight boxing champion of the world on February 25, 1964. Some years earlier he had won the world light heavyweight boxing championship at the Olympics at Rome. He contends that he became a minister of the Muslims in early 1964. In the first information which he supplied to his local board on selective service forms, his occupation was shown to be that of "professional boxer" and "professional prizefighter." The Report of Medical History dated January 24, 1964 showed his usual occupation to be "boxing." During all this time he made numerous trips to foreign countries to engage in professional bouts which he stated required daily physical training and exercise in preparation for these prizefights.

His Current Information Questionnaire dated February 2, 1966 listed his occupation as a "professional boxer" and his work as "professional fighting." Then, on February 17, 1966, the eventful and important date in this case, his 1-Y classification was changed by the local board to 1-A. Clay (Ali) had never stated to his board or claimed to be a minister or a conscientious objector prior to that time. He wrote Local Board No. 47 on February 14, 1966, just three days prior to his reclassification that "My occupation is professional boxer, and I am at present the Heavyweight Champion of the World." Even when he filled out the Special Form for Conscientious Objector dated February 28, 1966, though claiming to be a member of the Nation of Islam, he did not claim to be a minister. His letter of March 17, 1966 to Local Board No. 47 protested that his reclassification imposed "grave hardship upon me as heavyweight champion of the world at now age 24." When he appeared in person before Local Board No. 47 on March 19, 1966, boxing was listed as his livelihood. The evidence which the local board had before it was much more than necessary to constitute a "basis in fact" for his 1-A classification and denial of the ministerial exemption. His vocation is clearly that of a professional boxer.

IV.

DENIAL OF CONSCIENTIOUS OBJECTOR STATUS

Appellant's claim that he is a conscientious objector began on February 18, 1966, one day after his re-

classification to 1-A, at which time he was furnished the Special Form for Conscientious Objector. He was granted a personal appearance before Local Board No. 47 on March 19, 1966, pursuant to his request. The board's record of that appearance reflects that he claimed hardship on account of taking care of his parents and paying alimony to his former wife. The board's record states, "His religion teaches them not to take part in any way with infidels or any nonreligious group. They fight only in self-defense, not war. Boxing is considered his livelihood." Also, "Clay objects to being in service because he has no quarrel with the Viet Cong. Clay stated that he could not, without being a hypocrit, [sic] take part in anything such as war or anything that is against the Moslim religion." He wrote a lengthy letter to his local board dated April 16, 1966, in which he repeated his hardship request as the sole support of his mother and on account of having to pay alimony to his first wife. He protested that two years of military service would cause him serious financial loss in being unable to pursue his livelihood as a professional boxer.[13] The local board nevertheless reaffirmed the

[13] The pertinent part of the letter to the board reads as follows: "Two years is a very long time in the life of a heavyweight champ—from age 22 when I was classified from 1-A to 1-Y, and my present age 24. From age 24—to age 26 I may never be able to overcome this time of loss of boxing sharpness and come back from the service and earn the kind of money required to pay off these financial obligations, even though they may be abated during the time of military service. I would therefore be in hock for the rest of my life, whereas if I can get in a few more fights, which are lined up through the fall of this year, I should be able to settle these permanent financial obligations from the money I should get within this year, while I am at my peak of shape and am the Heavyweight Champion of the World. A 6-month defense is necessary to retain the title."

1-A classification and the registrant appealed to the appeal board. On May 6, 1966, the complete file was reviewed by the Kentucky Board of Appeals which tentatively determined that the registrant should not be classified in Class 1-O (conscientious objector) or in a lower class. See 32 C.F.R. § 1626.25(a), (b).

The Department of Justice then requested a Federal Bureau of Investigation investigation and a special hearing on the character and good faith of the conscientious objections of the registrant. (32 C.F.R. § 1626.25(d).)[14] The special hearing was held on August 23, 1966, at Louisville, Kentucky, before former Circuit Judge Lawrence Grauman as hearing officer. The hearing officer reported to the Department of Justice that the registrant stated his views in a convincing manner, answered all questions forthrightly, that he was impressed by the statements, believed the registrant was of good character, morals and integrity and sincere in his objection on religious grounds to participation in war in any form. He recommended that his conscientious objector claim be sustained. However, the Department of Justice in a detailed and comprehensive letter opposed his claim[15] and recommended to the Kentucky Board of Appeals that it not be sustained. The Department of Justice concluded that registrant's objections to participation in war insofar as they are based upon the

[14] The regulations follow generally the provisions of the Act on the procedure for considering conscientious objections. See 50 U.S.C. App. § 456(j).

[15] The Department's written objections are to be found in the file in a 17-page letter dated November 25, 1966 to the Chairman of the Appeal Board, Western District of Kentucky.

teachings of the Nation of Islam "rest on grounds which are primarily political and racial. These constitute objections to only certain types of war in certain circumstances, rather than a general scruple against participation in war in any form."[16] The De-

[16] For a penetrating analysis of the beliefs of the Black Muslims, see *Sostre v. McGinnes*, 2 Cir., 1964, 334 F. 2d 906, cert. denied, 379 U. S. 892, 85 S. Ct. 168 (1964). The Court said in that case (at 909):

> "Basic to the problem of prison discipline is the fact that the teachings of Elijah Muhammad include condemnation of the entire white race as wholly 'evil,' composed of devils, murderers, thieves, robbers, scientists at tricks, world snoopers, meddlers and liars.[4] Presenting almost equal difficulty is the Muslims' demand for total segregation between whites and blacks. These Muslims also adopt the position that the Christian religion is loathsome and despicable.[5]

[4] Elijah Muhammad has said:

> "'The white race or Caucasian European race is known to God and his prophets as Satan, the devil, the enemy of God and his people (the original nation) power was given to them to rule with evil and falsehood the darker nations for six thousand years. They have done and are now forty-six years overtime and they know this. It will take a few years to complete the separation. Nevertheless the work is going on now at a very good rate of speed.'
>
> "'The truth of the white race will make all black mankind hate them. The truth of the white race and kind will make all black mankind hate them regardless of their color; black, brown, yellow or red. The truth of the white race is a part of that secret which was withheld by Allah to allow them, the devils, to live their time, six thousand years.'
>
> "'If you understood it right you will agree with me that the whole Caucasian Race is a race of devils.'

"(The quotations are from the Supreme Wisdom containing 'the teachings' of the Honorable Elijah Muhammad. This work was an exhibit in the present case.)

"Malcolm X, at the time a 'minister' of the Muslims, said of an airplane accident in which more than 120 white people were killed:

> "'Well, somebody came and told me that he really had answered our prayers over in France. He dropped an airplane out of the sky with over one hundred twenty white people on it, because the Muslims believe in an eye for an eye and a tooth for a tooth, but thanks to

partment of Justice pointed out that only a general scruple against participation in war in any form can support a claim for conscientious objector status, citing *United States v. Kauten*, 2 Cir., 1943, 133 F. 2d 703.[17] The Department of Justice said that the registrant had not consistently manifested his conscientious objector claim and had not shown overt manifestations sufficient to establish his subjective belief where his claim was not asserted until military service became imminent, not having been made at all prior to being reclassified 1-A in February 1966, and cited in support thereof *Campbell v. United States*, 4 Cir., 1955, 221 F. 2d 454, and *United States v. Corliss*, 2 Cir., 1960, 280 F. 2d 808, cert. denied, 364 U. S. 884, 81 S. Ct. 167 (1960). Numerous statements by the registrant made from time to time were quoted by the Department of Justice in justification of its recommendation against the registrant's conscientious objector claim.[18]

God or Jehovah or Allah' we will continue to pray and we hope that every day another plane falls out of the sky.'

"[5] 'Bratcher said in the presence of white officers and white inmates, to another colored inmate, "This goddam Jesus Christ has got to go. He has served the purpose of the white man long enough."' (Testimony of A. J. Meyer.)"

[17] The Department of Justice's letter said in part: "It seems clear that the teachings of the Nation of Islam preclude fighting for the United States not because of objections to participation in war in any form but rather because of political and racial objections to policies of the United States as interpreted by Elijah Muhammad." (Letter p. 10.)

[18] The special hearing officer quoted the following passage from the registrant's letter to the local board dated February 14, 1966:

"'3. That I am a devoit Muslim and a follower of Islamic religious faith under the discipline of the prophet Elijah Muhammad. To bear arms or kill is against my religion and I conscientiously object to any combat military service that involves the participation in any war in which the lives

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The registrant was furnished with a copy of the adverse recommendation of the Department of Justice. The Kentucky Appeal Board thereafter reaffirmed the 1-A classification.

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of human beings is taken. This I do not believe to be righteous. This has been my faith upward of five years." [sic]"

The Department of Justice's letter recommendation said:

"It should be noted that while the resume statement of the attorney for the sponsoring group did, as noted by the Hearing Officer, express the opinion that registrant sincerely believes that he is conscientiously opposed to military service, the resume also reflects that the attorney believed that registrant would be sincere in his claim as a conscientious objector 'to the extent that registrant can be sincere in a belief'. The resume further reflects that the attorney 'could not be sure how deep any human conviction goes with the registrant' and that he is 'not certain as to what motivates the registrant in this respect.' (Resume, page 5) The attorney added that in view of his past experiences with the registrant changing his mind, he would not be surprised 'if a year from now the registrant becomes disenchanted with the Muslims and voluntarily joins the United States Marines.' The member of the sponsoring group, it should also be noted, stated that 'I'll go to my grave believing registrant basically is a good boy and was brainwashed first by his father and then by the Muslims.' (Resume, page 7)."

At the special hearing, in response to a question of the hearing officer, the registrant stated, "If the Honorable Elijah Muhammad looked me in my face and he who I believe is directly from Allah, Almighty God Allah, and if he looked at me and advised me, which I'm sure he wouldn't, to fight in any kind of war, if he advised me to I would." Then the registrant testified:

"Sir, I said earlier and I'd like to again, to make that plain, that it would be no trouble for me to accept conscientious objector on the basis that I'll go into the Armed Services boxing exhibitions in Viet Nam, or traveling the country at the expense of the Government or living in the easy life and not having to get out in the mud and fight and shoot and if this — — if I could do this, or if it was something I wanted to do, of was in my heart to do if it wasn't against my conscience to do it, I would easily do it. I wouldn't raise all this court stuff and I wouldn't go through all of this and lose and give up the millions that I gave up and my image with the American public that I would say is completely dead and ruined because of us in here now, and so I wouldn't turn down so many millions and jeopardize my life walking the streets of the South and all of America with no bodyguard if I wasn't sincere in every bit of what

Whether the registrant's beliefs are "truly held" is the threshold question of sincerity which must be resolved by the board. *United States v. Seeger*, 380 U. S. 163, 185, 85 S. Ct. 850, 863 (1965).[19] The "basis in fact" test applied to the conscientious objector claim of registrant was fully met in this case.

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the Holy Qur'an and the teachings of the Honorable Elijah Muhammad tell us and it is that we are not to participate in wars on the side of nobody who—on the side of non-believers, and this is a Christian country and this is not a Muslim country, and the Government and the history and the facts shows that every move toward the Honorable Elijah Muhammad is made to distort and is made to ridicule him and is made to condemn him and the Government has admitted that the police of Los Angeles were wrong about attacking and killing our brothers and sisters and they were wrong in Newark, New Jersey, and they were wrong in Louisiana, and the outright, everyday oppressors and enemies are the people as a whole, the whites of this nation. So, we are not, according to the Holy Qur'an, to even as much as aid in passing a cup of water to the—even a wounded. I mean, this is in the Holy Qur'an, and as I said earlier, this is not me talking to get the draft board—or to dodge nothing. This is there before I was borned and it will be there when I'm dead and we believe in not only that part of it, but all of it."

The registrant affirmed at the hearing that he was correctly quoted by the *Chicago Daily News* on February 18, 1966, the day after his reclassification to 1-A, as follows:

"I am a member of the Muslims and we don't go to no war unless they are declared by Ali himself. I don't have no personal quarrel with those Vietcongs.

• • •

"Let me tell you, we Muslims are taught to defend ourselves when we are attacked. Those Vietcong are not attacking me. These Vietcong are fighting a very nasty war over there. There is a lot of people getting killed. Why should we Muslims get involved? Besides, I am fighting for the government every day. I am laying my life on the line for the government. Nine out of ten soldiers would not want to be in my place in the ring. It is too dangerous."

[19] The Third Circuit recently rejected the claim of a Roman Catholic for conscientious objector classification who said he would fight only in a "just war" and that denial of such classification would violate his federally protected right to religious freedom and equal protection of the law. *United States v. Spiro*, 3 Cir., 1967, 384 F. 2d 159, cert. denied, ... U. S. ...., 88 S. Ct. 1028 (1968).

There was more than adequate evidence to justify the rejection of his claim.

V.

THE BILL OF ATTAINDER

The Constitution prohibits the passing of a bill of attainder by Congress, Art. I, § 9, Cl. 3, and a bill of attainder is said to be a legislative act which inflicts punishment without a judicial trial, *Cummings v. The State of Missouri*, 71 U. S. (4 Wall.) 277 (1867). As interpreted by the Supreme Court, this clause prohibits all legislative acts "no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial . . . ." *United States v. Lovett*, 328 U. S. 303, 315, 66 S. Ct. 1073, 1078 (1946). Accordingly, appellant contends that the whole proceeding of his classification and induction into the military service constituted a prohibited bill of attainder. The only issue submitted to the jury at his trial was whether he refused to take the step forward at the induction ceremony. Appellant contends in brief that "Every important factual adjudication was extra judicially made by administrative bodies operating under the Act." Since the draft board's authority flows from congressional enactment, appellant argues that Congress has subjected him to a non-judicially imposed penalty in a non-judicial forum. He maintains that he was classified without a judicial trial.

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So far as the trial proceedings before the District Court are concerned, there was no irregularity or failure to provide due process of law. The District Judge informed the jury that he had examined the defendant's Selective Service File and found, as a matter of law, that there was a basis in fact for the 1-A classification given the registrant. The jury was instructed that it was not to consider the question of whether or not the defendant was entitled to this classification for this determination was not for the jury. This ruling and instruction was in exact conformity with the Supreme Court's teaching in *Cox v. United States*, 332 U. S. 442, 452, 453, 68 S. Ct. 115, 120 (1947), where the Court said:

> "Whether there was 'no basis in fact' for the classification is not a question to be determined by the jury on an independent consideration of the evidence. The concept of a jury passing independently on an issue previously determined by an administrative body or reviewing the action of an administrative body is contrary to settled federal administrative practice; the constitutional right to jury trial does not include the right to have a jury pass on the validity of an administrative order."

Proceedings before local and appeal boards are informal and are stripped of the panoply of formal judicial tribunals. *United States v. Pitt*, 3 Cir., 1944, 144 F. 2d 169, 172. Such proceedings are non-judicial in nature and are clearly non-criminal, for appellant

was neither a suspect nor an accused and he was appearing before the boards which were giving him a hearing only in an administrative proceeding. *United States v. Sturgis*, 3 Cir., 1965, 342 F. 2d 328, 332. It is true that appellant sought a judicial determination of his case prior to induction, and the decision was adverse in every tribunal to which he presented this issue. The Sixth Circuit, in declining to grant him an injunction pending his appeal from the decision of the Kentucky Federal District Court, said:

> "We do not believe that Congress ever intended that draftees should have the right to litigate the validity of their induction before acceptance for National Service. If injunction suits were permitted, interminable delays would undoubtedly result while the cases were being processed in the Courts. Such a procedure would interfere with the orderly proceedings of the draft boards and prevent them from filling their quotas and supplying the armed forces with much needed personnel." *Muhammad Ali v. Breathitt*, 6 Cir., April 17, 1967, Docket No. 17834, unpublished.

Similar relief was also denied by the Fifth Circuit by its numerous orders to which we have previously referred.

The most recent amendment to the draft law (now called the Military Selective Service Act of 1967) permits judicial review only "as a defense to a criminal prosecution instituted. . . after the registrant has

responded either affirmatively or negatively to an order to report for induction."[20] The amendment was undoubtedly Congress' answer to the holding in *Wolff v. Selective Service Local Board No. 16*, 2 Cir., 1967, 372 F. 2d 817, in which the Second Circuit upheld preinduction judicial review[21] of a selective service classification which allegedly infringed upon the constitutional right to free speech. That case involved the reclassification of deferred students, making them available for military duty because of participation in Viet Nam. Preinduction consideration was afforded petitioners on the narrow constitutional ground that the reclassification would have a continued chilling effect, *Dombrowski v. Pfister*, 380 U. S. 479, 85 S. Ct. 1116 (1965), on them by being subjected to the added sanction of induction. It is

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[20] 50 U.S.C. App. § 460(b)(3), as amended in 1967, reads as follows:

> "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided*, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant."

[21] "While there was no serious question that eventually petitioners would be able to secure review, *Wolff* is the first case allowing direct judicial review of a registrant's classification prior to induction. It had been held almost without exception that aggrieved registrants could not challenge the determinations of their local boards in the courts except by either submitting to induction and seeking habeas corpus relief, or by refusing induction and securing review by way of a defense to a criminal prosecution." Comment, 81 Harv. L. Rev. 685, 686 (1968). The Government did not file a petition for certiorari in the *Wolff* case.

clear by the 1967 amendment to the Act that Congress intends there be no preinduction judicial proceedings which would interfere with the orderly drafting of needed manpower for the armed forces. *DuVernay v. United States*, 5 Cir., 1968, ... F. 2d .... [No. 24132, February 7, 1968]. Judicial review prior to induction, even on constitutional grounds, is an open invitation to a large volume of litigation, much of which we could expect would undoubtedly be based on frivolous grounds in an attempt to delay or evade military service. As the Supreme Court said in *Falbo v. United States*, 320 U. S. 549, 554, 64 S. Ct. 346, 349 (1944):

> "The circumstances under which the Act was adopted lend no support to a view which would allow litigious interruption of the process of selection which Congress created. To meet the need which it felt for mobilizing national manpower in the shortest practicable period, Congress established a machinery which it deemed efficient for inducting great numbers of men into the armed forces. Careful provisions were made for fair administration of the Act's policies within the framework of the selective service process. But Congress apparently regarded 'a prompt and unhesitating obedience to orders' issued in that process 'indispensable to the complete attainment of the object' of national defense. Martin v. Mott, 12 Wheat. 19, 30, 25 U. S. 19, 30, 6 L. Ed. 537. Surely if Congress had intended to authorize interference with that

process by intermediate challenges of orders to report, it would have said so."

The registrant's remedy is in defense to a criminal prosecution if he declines induction, and habeas corpus if he accepts induction but is still aggrieved by the classification process. *Witmer v. United States*, 348 U. S. 375, 377, 75 S. Ct. 392, 394 (1955).[22]

In the present matter the registrant fully exhausted all administrative remedies available to him. In that respect the case differs from *DuVernay v. United States*, 5 Cir., 1968, ... F. 2d .... [No. 24132, February 7, 1968], where we affirmed the conviction of *DuVernay* because of his failure to exhaust administrative remedies. We also pointed out in footnote 6 of that case (..... F. 2d ....) that as to the attack on the racial composition of the local board, since draft board members are public officers appointed by the President, a challenge to the composition of the board indirectly challenges the qualifications of the present members and their eligibility to perform their duties. We said that the public officers'

[22] In *Schwartz v. Strauss*, 1953, 206 F. 2d 767, the Second Circuit affirmed on the opinion below (114 F. Supp. 438) the District Court's denial of relief to a plaintiff who sought a preinduction declaratory judgment and an injunction "claiming that his selective service classification is erroneous as a matter of law and that he is thereby deprived of certain constitutional rights." The District Court said "that there are many authorities that do not permit judicial review before induction" and that "the Congressional intent was to keep the administrative process of the Selective Service System free from the delays and disruption incident to court interference prior to induction." The Court said that "plaintiff's remedy is by way of habeas corpus after induction or by refusing to be inducted after the administrative process is complete." 114 F. Supp. at 439.

authority was not subject to collateral attack in the criminal proceeding but must be challenged by direct attack. *DuVernay's* conviction, however, was not affirmed on that issue but on the failure of the draftee to exhaust administrative remedies. While it is true that qualifications of a public officer generally may not be collaterally attacked, the charge of systematic exclusion of Negroes from draft boards in this case, where all administrative remedies have been exhausted, is of constitutional proportions and warrants our consideration and disposition of that issue. We do not view appellant's contention here as requiring the removal of draft board members because of so-called systematic exclusion or racial imbalance, but that appellant seeks to have their acts declared invalid as to him. It is apparent that the systematic exclusion contention must, therefore, be decided. Accordingly, we have given full consideration to that contention, now urged in this criminal proceeding, though we believe it is not applicable insofar as draft board membership is concerned, and, at the least, that the acts of such boards are de facto valid and binding. *United States v. Commonwealth of Pennsylvania*, D. C., W. D. Penna., 1963, 214 F. Supp. 913; *United States v. Lindsley*, 7 Cir., 1945, 148 F. 2d 22, cert. denied, 325 U. S. 858, 65 S. Ct. 1195 (1945). There is no question involved here of the board acting beyond its jurisdiction in classifying and attempting to induct appellant who, under the Act and regulations, is clearly a proper subject for military service in the armed forces of the United States. Since under the Act and the settled law the system-

atic exclusion contention may not properly be raised prior to induction, we have concluded that it is reasonable, all administrative and other remedies having been exhausted by appellant, that we meet the issue squarely and resolve it, which we have done.[23]

There is no merit to the bill of attainder argument as we have seen.

The conviction and sentence are, therefore, AFFIRMED.

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[23] Appellant raised another issue which is without merit. He claimed deprivation of due process because of the inclusion in his Selective Service File of numerous letters and newspaper clippings alleged to be prejudicial, and also because of pre-final classification statements of General Hershey, the National Director, and Congressman Rivers, Chairman of the House Armed Services Committee. We have heretofore described the statements of General Hershey and Congressman Rivers in Chapter II of this opinion. The record shows quite clearly that it is the practice of local boards to place all correspondence relating to a registrant in his file. A number of letters and clippings from members of the general public protesting the delay in inducting appellant were received by the board and filed. The record is devoid of any indication that these letters and clippings played any part whatsoever in the ultimate classification of appellant. That is also true of the statements of the General and Congressman. As to General Hershey's statement, we have already shown that board is independent of the National Director as provided in 32 C.F.R. § 1604.6(a), (b), (c), and it was General Hershey who caused an appeal of registrant's case to the Presidential Appeal Board. Obviously it is the right of Congressmen to express opinions on matters of public interest, including registrant's draft case. But nothing in the record of this case shows that Congressman Rivers' statement had any effect on the classification of appellant.

Adm. Office, U. S. Courts—E. S. Upton Printing Co., N. O., La.

Prior Order Denying Petition for Rehearing and Petition for Rehearing *En Banc*

(June 6, 1968)

Before COLEMAN, AINSWORTH and DYER, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is Denied and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 25(a), subpar. (b), the Petition for Rehearing En Banc is Denied.

Transcript of District Court's Oral Findings

(Rendered June 20, 1967)

The Court:

Well, I have read the draft board file and I have reached the conclusion there is ample evidence in the file to support the action of the draft board. Mr. Covington has said basis in fact must be found in the draft board file, and I think it is found here.

Now, just to summarize some of the evidence that I find that I conclude does support the action of the draft board, first I want to describe the file. I am doing this for the record, not because counsel on either side need it described for them. You know it as well as I do. It is not the neatest of files. There are many pages in it. To begin with there is I think the main portion of the file, just a group of loose sheets in the file and they are not arranged chronologically. They are numbered for convenience and identification consecutively as they appear in that file, but they are not in any chronological or other logical form, logical sequence.

I will ask that we have order in the courtroom. I do not intend to be facetious and what I say is not calculated to inspire laughter and what I had to say is serious. At least it is serious to me and I am sure it is serious to the Defendant and I hope it is serious to prosecution.

I am going to refer to these pages by the pencil figures that appear thereon. In other sections of the file there is pointed out there is quite a volume of petitions signed by brothers of the Defendant's religious faith. Most of them are on mimeographed forms. There are some variations in

the forms. You will find one form an identical form with many signatures on those petitions, and then another form. I read the various forms and observed that there are quite a number of signatures. I will take counsel's word for the number of signatures appearing thereon. I did not count the signatures. I did observe there are quite a volume of them.

Then there are those other miscellaneous—what Mr. Covington has referred to and I refer to as crank letters of people advising the draft board what to do, just as I have received many advising me what I should do. I did not even read them. I have asked my secretary to file them according to states. If we ever have to refer to them, we will refer to them in that way. I don't anticipate that we will.

I will say for the record out of the presence of the jury that I have received quite a volume of what I call crank mail and have received some telegrams. Most of them start off with the statement that they are not presuming to tell me what to do, and then they proceed to do that. That is the form of most of the letters I receive asking for jury excuses. In paragraph 1 they protest how conscientious they are of their civic responsibility and in paragraph 2 why they don't want to serve.

Proceeding further, in referring to matters in the file which I believe prove the basis in fact for the action of the draft board, and I'm not referring to any crank letters, I am not referring to newspaper clippings, and again I want to say that these letters are not arranged chronologically and I am referring to them in the order in which they appear in the file, which is not a chronological order.

On page 260 is a letter dated October 19, 1966. This was after the Defendant has made his claim for ministerial

exemption. It is a typewritten letter and it is signed by the registrant, the Defendant himself, and in that letter addressed to the draft board he asks leave to go to Mexico to negotiate a fight and to observe his prospective opponent in action. He didn't say anything in that letter that he was going there to preach the word of Allah or to seek converts, but his request to leave the country to go to Mexico was to negotiate a fight and to observe his prospective opponent in action. I think that would give some support to the finding of the draft board that he was a professional boxer as he claimed to be.

Then on page 467 is another letter, typewritten letter, signed by the registrant, the Defendant Clay, dated July 7, 1966. This letter was before his claim for ministerial exemption. The previous one was after. In that letter he asked leave to go to England to defend his world heavy weight championship and he also advised in that letter he would later want to go to Germany to defend his title there.

But again in the letter to the draft board the proposition of his projected visits out of the country to England and to Germany to defend his heavy weight championship. Again, he made no mention that he was going to those countries or that he would be going to those countries to preach the word of Allah.

Then at page 458 is another letter, typewritten and signed by registrant, Defendant Clay, dated August 8, 1966, which was a short time before he made his claim for ministerial exemption. In that letter he asked leave to go to Germany to defendant [*sic*] his world heavy weight championship there. He stated in his letter previously that he would have such a request. In July he told them he would have a request to go to Germany and, true to his

word, he did have such a request to go there, and why, to defend his world heavy weight championship there. Again, the request was not to go there for the purpose of preaching the word of Allah.

Then page 474 is another letter in his own handwriting signed by the registrant, Defendant Clay. This letter is dated April 26, 1966, and in this letter he asked to go to England to defend his world heavy weight boxing title. Again, no mention that he wanted to go there to preach the word of Allah.

At page 491 is another letter in his own handwriting and signed by the registrant, Defendant Clay, dated March 17, 1966, in which he protests the reclassification by the draft board and in his letter he states the reasons he does so protest. He protests his reclassification for the reason that the reclassification has and does at this time impose great hardship upon me as heavy weight champion of the world now at age 24. He asked the draft board to reconsider his classification. That is his protest, because of hardship. He says nothing there about a ministerial exemption.

Then at page 504, letter dated April 16, 1966 in his handwriting, signed by the registrant, Defendant Clay. This is a month later than the previous letter. Again, he protests his reclassification for the following reasons:

A, he says he is the sole support of his mother. B, because he had just gone through an expensive divorce and made a settlement of $150,000 on his wife and was required to pay her $1250.00 per month alimony; the conclusions being he couldn't do that on a soldier's pay. But, again, he protests his reclassification for entirely different reasons. I don't know why he didn't think then to claim that he was a minister, but he did not.

Then at page 524 appears another letter dated February 14, 1966, in his own handwriting. The letter is signed by

the registrant, Defendant Clay. He protests his reclassification for the following reasons:

One, my occupation is professional boxer—and he goes on with that explanation. Two, that he married August 14, 1964, divorced January 11, 1966 because his wife failed to comply with her premarital agreement as to the tenets of the Muslim faith. Then a divorce was expense: Three, that he is a devout Muslim and has convictions also against killing or bearing arms. Now, in this letter he protests his Muslim faith, his Muslim religion, but he does not say that he is a minister. He says that his marriage broke up because his wife did not follow through with her premarital agreement with the tenets of his faith, the Muslim faith, and then he says that he is a devout Muslim and has conscientious scruples against killing or bearing arms, but he makes no claim to being a minister.

Now, we are well aware that the Selective Service Act recognizes conscientious objectors. As I remember it, a conscientious objector may be assigned to non-combatant duty in the armed forces of the United States or he may be assigned to work of national importance under civilian direction. But that problem has never been brought to you. I don't think he has said in so many words, "I am an conscientious objector, I do not believe in killing or bearing arms and therefore I want to be assigned to non-combatant duty or to work of national importance under civilian direction."

I think the basis in fact for the action of the draft board is amply supported by the evidence appearing in the file, and I find that there was basis in fact for such action. I deny the motion for acquittal upon all of the grounds asserted.

It is now five minutes after four. How much time will you gentlemen want to present your arguments?

Affidavit of Attorney General Mitchell

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

[Title and number omitted; Clerk's certificate omitted.]

AFFIDAVIT

District of Columbia)
Washington, D. C.) ss

John N. Mitchell being duly sworn deposes and says:

1. I am the Attorney General of the United States.

2. This affidavit is submitted in connection with the government's opposition to the disclosure to the defendant of information concerning the overhearing of a conversation of the defendant which occurred during the course of an electronic surveillance which was being maintained to gather foreign intelligence information.

3. On one occasion, in June, 1965, the defendant participated in a conversation which was overheard by government agents who were monitoring a wiretap which was being maintained for the purpose of gathering foreign intelligence information. [694] Submitted with this affidavit, as sealed Exhibit A for the court's *in camera* examination, is a copy of the log of the overheard conversation and a description of the premises which were the subject of the surveillance. It is apparent from these materials that neither the defendant nor any premises in which he had an interest was the subject of this surveillance and that the surveillance was being conducted to gather foreign intelligence information.

4. The records of the Department of Justice reflect that the installation of this surveillance was expressly approved by the then Attorney General of the United States. Submitted with this affidavit, as sealed Exhibit B for the court's *in camera* examination, is a copy of the memorandum reflecting the

Attorney General's express approval of the installation of this surveillance.

5. I certify that it would prejudice the national interest to disclose the particular facts concerning this surveillance other than to the court *in camera*. Accordingly, Exhibits A and B referred to herein are being submitted solely for the court's *in camera* inspection and copies of those exhibits are not being furnished to the defendant. I would request the court, at the conclusion of its hearing on this matter, to place these exhibits in a sealed envelope and return them to the [695] Department of Justice where they will be retained under seal so that they may be submitted to any appellate court that may review this matter.

/s/ John N. Mitchell
Attorney General of the United States

[Jurat omitted.]

Memorandum From President Roosevelt

THE WHITE HOUSE
WASHINGTON

CONFIDENTIAL May 21, 1940

MEMORANDUM FOR THE ATTORNEY GENERAL

I have agreed with the broad purpose of the Supreme Court decision relating to wire-tapping in investigations. The Court is undoubtedly sound both in regard to the use of evidence secured over tapped wires in the prosecution of citizens in criminal cases; and is also right in its opinion that under ordinary and normal circumstances wire-tapping by Government agents should not be carried on for the excellent reason that it is almost bound to lead to abuse of civil rights.

However, I am convinced that the Supreme Court never intended any dictum in the particular case which it decided to apply to grave matters involving the defense of the nation.

It is, of course, well known that certain other nations have been engaged in the organization of propaganda of so-called "fifth columns" in other countries and in preparation for sabotage, as well as in actual sabotage.

It is too late to do anything about it after sabotage, assassinations and "fifth column" activities are completed.

You are, therefore, authorized and directed in such cases as you may approve, after investigation of the need in each case, to authorize the necessary investigation agents that they are at liberty to secure information by listening devices direct to the conversation or other communications of persons suspected of

Memorandum From President Roosevelt

subversive activities against the Government of the United States, including suspected spies. You are requested furthermore to limit these investigations so conducted to a minimum and to limit them insofar as possible to aliens.

(s) F. D. R.

Memorandum of President Truman

Office of the Attorney General
Washington, D.C.

July 17, 1946.

The President,
The White House,

My dear Mr. President:

Under date of May 21, 1940, President Franklin D. Roosevelt, in a memorandum addressed to Attorney General Jackson, stated:

> "You are therefore authorized and directed in such cases as you may approve, after investigation of the need in each case, to authorize the necessary investigating agents that they are at liberty to secure information by listening devices directed to the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies."

This directive was followed by Attorneys General Jackson and Biddle, and is being followed currently in this Department. I consider it appropriate, however, to bring the subject to your attention at this time.

It seems to me that in the present troubled period in international affairs, accompanied as it is by an increase in subversive activity here at home, it is as necessary as it was in 1940 to take the investigative measures referred to in President Roosevelt's memorandum. At the same time, the country is threatened by a very substantial increase in crime. While I am reluctant to suggest any use whatever of these special investigative measures in domestic cases, it seems to me imperative to

Memorandum of President Truman

use them in cases vitally affecting the domestic security, or where human life is in jeopardy.

As so modified, I believe the outstanding directive should be continued in force. If you concur in this policy, I should appreciate it if you would so indicate at the foot of this letter.

In my opinion, the measures proposed are within the authority of law; and I have in the files of the Department materials indicating to me that my two most recent predecessors as Attorney General would concur in this view.

Respectfully yours,

/s/ Tom C. Clark

Attorney General.

I concur July 17, 1947

/s/ Harry S. Truman

Memorandum of President Johnson

ADMINISTRATIVELY CONFIDENTIAL

THE WHITE HOUSE
WASHINGTON

June 30, 1965

MEMORANDUM FOR THE HEADS
OF EXECUTIVE DEPARTMENTS AND AGENCIES

I am strongly opposed to the interception of telephone conversations as a general investigative technique. I recognize that mechanical and electronic devices may sometimes be essential in protecting our national security. Nevertheless, it is clear that indiscriminate use of these investigative devices to overhear telephone conversations, without the knowledge or consent of any of the persons involved, could result in serious abuses and invasions of privacy. In my view, the invasion of privacy of communications is a highly offensive practice which should be engaged in only where the national security is at stake. To avoid any misunderstanding on this subject in the Federal Government, I am establishing the following basic guidelines to be followed by all government agencies:

(1) No federal personnel is to intercept telephone conversations within the United States by any mechanical or electronic device, without the consent of one of the parties involved (except in connection with investigations related to the national security).

(2) No interception shall be undertaken or continued without first obtaining the approval of the Attorney General.

ADMINISTRATIVELY CONFIDENTIAL

Memorandum of President Johnson

(3) All federal agencies shall immediately conform their practices and procedures to the provisions of this order.

Utilization of mechanical or electronic devices to overhear non-telephone conversations is an even more difficult problem which raises substantial and unresolved questions of Constitutional interpretation, I desire that each agency conducting such investigations consult with the Attorney General to ascertain whether the agency's practices are fully in accord with the law and with a decent regard for the rights of others.

Every agency head shall submit to the Attorney General within 30 days a complete inventory of all mechanical and electronic equipment and devices used for or capable of intercepting telephone conversations. In addition, such reports shall contain a list of any interceptions currently authorized and the reasons for them.

/s/ Lyndon B. Johnson

Constitutional and Statutory Provisions and Regulations Involved

United States Constitution

Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitutional and Statutory Provisions and Regulations Involved

Amendment XIV, §1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Communications Act, 47 U. S. C. §605 (Prior to 1968 amendment)

> §605. Unauthorized publication or use of communications
>
> No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communica-

tion and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

Universal Military Training and Service Act, 50 U. S. C. App. §§451–63 (Prior to the adoption of the Military Service Act of 1967)

§451(c):

The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selec-

tion which is fair and just, and which is consistent with the maintenance of an effective national economy.

§455(a):

The selection of persons for training and service under section 4 [section 454 of this Appendix] shall be made in an impartial manner, under such rules and regulations as the President may prescribe, from the persons who are liable for such training and service and who at the time of selection are registered and classified, but not deferred or exempted: *Provided,* That in the selection of persons for training and service under this title [sections 451–454 and 455–471 of this Appendix], and in the interpretation and execution of the provisions of this title [said sections], there shall be no discrimination against any person on account of race or color . . .

§456(g):

Regular or duly ordained ministers of religion, as defined in this title [sections 451–454 and 455–471 of this Appendix], and students preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools, or who are satisfactorily pursuing full-time courses of instruction leading to their entrance into recognized theological or divinity schools in which they have been pre-enrolled, shall be exempt from training and service (but not from registration) under this title [said sections].

Constitutional and Statutory Provisions and Regulations Involved

§456(j):

Nothing contained in this title [sections 451–454 and 455–471 of this Appendix] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title [said sections], be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) [section 454 (b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title [section 462 of this Appendix], to have knowingly failed or neglected to perform a duty required of him under

this title [sections 451-454 and 455-471 of this Appendix]. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title [said sections], he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) [section 454 (b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title [sections 451–454 and 455–471 of this Appendix].

Constitutional and Statutory Provisions and Regulations Involved

§460(b)(3):

(3) to create and establish within the Selective Service System civilian local boards, civilian appeal boards, and such other civilian agencies, including agencies of appeal, as may be necessary to carry out its functions with respect to the registration, examination, classification, selection, assignment, delivery for induction, and maintenance of records of persons registered under this title [said sections], together with such other duties as may be assigned under this title [said sections]. He shall create and establish one or more local boards in each county or political subdivision corresponding thereto of each State, Territory, and possession of the United States, and in the District of Columbia. Each local board shall consist of three or more members to be appointed by the President from recommendations made by the respective governors or comparable executive officials . . . . No member of any local board shall be a member of the armed forces of the United States, but each member of any local board shall be a civilian who is a citizen of the United States residing in the county or political subdivision corresponding thereto in which such local board has jurisdiction, and each intercounty local board shall have at least one member from each county or political subdivision corresponding thereto included within the intercounty local board area. Such local boards, or separate panels thereof each consisting of three or more members, shall, under rules and regulations prescribed by the President, have the power within the respective jurisdictions of such local boards to hear and determine, subject to the right of appeal

to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this title [said sections], of all individuals within the jurisdiction of such local boards. The decisions of such local board shall be final, except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe. There shall be not less than one appeal board located within the area of each Federal judicial district in the United States and within each Territory and possession of the United States, and such additional separate panels thereof, as may be prescribed by the President. Appeal boards within the Selective Service System shall be composed of civilians who are citizens of the United States and who are not members of the armed forces. The decision of such appeal boards shall be final in cases before them on appeal unless modified or changed by the President. The President, upon appeal or upon his own motion, shall have power to determine all claims or questions with respect to inclusion for, or exemption or deferment from training and service under this title [said sections], and the determination of the President shall be final. No person who is a civilian officer, member, agent, or employee of the Office of Selective Service Records or the Selective Service System, or of any local board or appeal board or other agency of such Officer or System, shall be excepted from registration or deferred or exempted from training and service, as provided for in this title [said sections], by reason of his status as such civilian officer, member, agent, or employee . . . .

Constitutional and Statutory Provisions and Regulations Involved

§462(a):

(a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451–454 and 455–471 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title [said sections], rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title [said sections], or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title [said sections], or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title [said sections], or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title [said sections], or rules, regulations or directions made pursuant to this title [said sections], or any person or persons who shall knowingly

hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this [said sections] or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction shall suffer such punishment as a court martial may direct. . . .

Selective Service Regulations, 32 C. F. R. Part 1600.

1600.735-1 Conduct Requirements in General.—(a) The maintenance of unusually high standards of honesty, integrity, impartiality, and conduct by Government employees and special Government employees is essential to assure the proper performance of the Government business and the maintenance of confidence by citizens in their Government.

(b) Employees of the Selective Service System shall conduct themselves in such a manner that the work of the System is effectively accomplished; shall be courteous, considerate, and prompt in dealing with or serving the public; and shall conduct themselves in both their official and personal lives in a manner that will not bring discredit or embarrassment to the Selective Service System.

(c) Employees shall observe the applicable laws and regulations governing participation in political activities; avoid any discrimination because of race, color, religion, national origin, or sex; economically utilize, protect, and

conserve Federal property entrusted to them; and conduct all their official activities in a manner which is above reproach and free from any indiscretions or acceptance of gratuities or favors which would cast doubt or suspicion upon themselves or the administration of the Selective Service System.

1604.22 Composition and Appointment.—For each appeal board area an appeal board, normally of five members, shall be appointed by the President, upon recommendation of the Governor. The members shall be male citizens of the United States who are not members of the armed forces or any reserve component thereof; they shall be residents of the area in which their board is appointed; and they shall be at least 30 years old. The appeal board should be a composite board, representative of the activities of its area, and as such should include one member from labor, one member from industry, one physician, one lawyer, and, where applicable, one member from agriculture. . . .

1604.24, Jurisdiction.—The appeal board shall have jurisdiction to review and to affirm or change any decision appealed to it from any local board in its area or any decision appealed from any local board not in its area when such appeal is either transferred to it in the manner provided in these regulations, or is appealed to it by or on behalf of any registrant whose principal place of employment is located in its area or submitted to it in the manner required by law.

1604.52 Composition and Appointment.—(a) A local board of three or more members shall be appointed for

each local board area by the President upon recommendation of the Governor.

(b) A local board of three or more members, with at least one member from each county included within the intercounty local board area, shall be appointed for each intercounty local board area by the President upon recommendation of the Governor.

(c) The members of local boards shall be male citizens of the United States who shall be residents of a county in which their local board has jurisdiction and who shall also, if at all practicable, be residents of the area in which their local board has jurisdiction. No member of a local board shall be a member of the armed forces or any reserve component thereof. Members of local boards shall be at least 30 years of age.

1604.54 Jurisdiction.—The jurisdiction of each local board shall extend to all persons registered in, or subject to registration in, the area for which it was appointed. It shall have full authority to do and perform all acts within its jurisdiction authorized by the selective service law.

1622.1 General Principles of Classification.

(b) Classification is the key to selection and it must be accomplished in the spirit of the Military Selective Service Act of 1967, in which the Congress has declared "that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."

Constitutional and Statutory Provisions and Regulations Involved

(c) It is the local board's responsibility to decide, subject to appeal, the class in which each registrant shall be placed. Each registrant will be considered as available for military service until his eligibility for deferment or exemption from military service is clearly established to the satisfaction of the local board. The local board will receive and consider all information, pertinent to the classification of a registrant, presented to it. The mailing by the local board of a Classification Questionnaire (SSS Form 100) to the latest address furnished by a registrant shall be notice to the registrant that unless information is presented to the local board, within the time specified for the return of the questionnaire, which will justify his deferment or exemption from military service the registrant will be classified in Class I-A.

(d) In classifying a registrant there shall be no discrimination for or against him because of his race, creed, or color, or because of his membership or activity in any labor, political, religious or other organization. Each such registrant shall receive equal justice.

1622.14 Class I-O: Conscientious Objector Available for Civilian Work Contributing to the Maintenance of the National Health, Safety, or Interest.—(a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces.

Constitutional and Statutory Provisions and Regulations Involved

(b) Section 6(j) of title I of the Universal Military Training and Service Act, as amended, provides in part as follows:

> "Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

1622.43 Class IV-D: Minister of Religion or Divinity Student.—(a) In Class IV-D shall be placed any registrant:

(1) Who is a regular minister of religion;

(2) Who is a duly ordained minister of religion;

(3) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction in a recognized theological or divinity school; or

(4) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction leading to entrance into a recognized theological or divinity school in which he has been pre-enrolled.

(b) Section 16 of the Military Selective Service Act of 1967, contains in part the following provisions:

> "SEC. 16. When used in this act— * * * (g) (1) the term 'duly ordained minister of religion' means a per-

son who has been ordained, in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.

"(2) The term 'regular minister of religion' means one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister.

"(3) The term 'regular or duly ordained minister of religion' does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization."

Constitutional and Statutory Provisions and Regulations Involved

1626.24 Review by Appeal Board.—(a) The appeal board shall consider appeals in the order in which they are received unless otherwise directed by the Director of Selective Service, in which event, they shall be considered in such order as the Director of Selective Service shall prescribe.

(b) In reviewing the appeal and classifying the registrant, the appeal board shall not receive or consider any information other than the following:

(1) Information contained in the record received from the local board.

(2) General information concerning economic, industrial, and social conditions.

(3) Any advisory recommendation from the Department of Justice under section 1626.25.

(4) Any reply to the recommendation of the Department of Justice received from the registrant under section 1626.25.

1626.25 Special Provisions When Appeal Involves Claim That Registrant Is a Conscientious Objector.—(a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall tentatively determine whether or not the registrant is eligible for classification in a class lower than Class I-O or in Class I-O. If the appeal board finds that the registrant is eligible for classification in Class I-O or in a lower class, it shall place him in the appropriate class.

(b) If the appeal board tentatively determines that the registrant is not entitled to classification in either a class lower than Class I-O or in Class I-O, it shall transmit the entire file to the United States Attorney for the Federal judicial district in which the appeal board has jurisdiction for the purpose of securing an advisory recommendation from the Department of Justice.

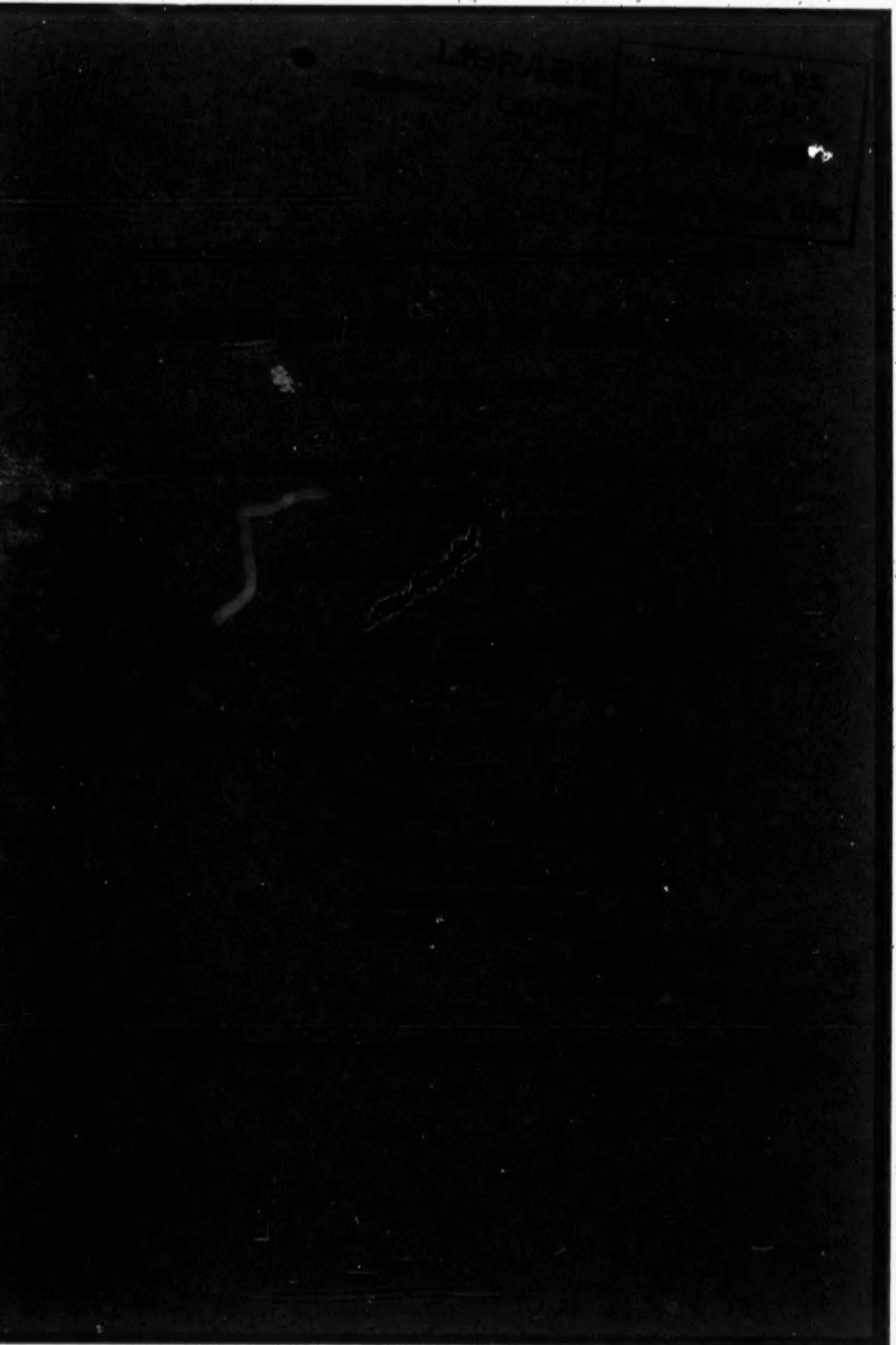
(c) No registrant's file shall be forwarded to the United States Attorney by any appeal board unless the record on the Classification Questionnaire (SSS Form No. 100) shows and the letter of transmittal states that the appeal board reviewed the file and tentatively determined that the registrant should not be classified in Class I-O or in a lower class. Any file forwarded to the United States Attorney without the information required by this paragraph shall be returned to the appeal board.

(d) Whenever a registrant's file is forwarded to the United States Attorney in accordance with paragraphs (b) and (c) of this section, the Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by his local board to perform for a period of twenty-four

consecutive months civilian work contributing to the maintenance of the national health, safety, or interest. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

(e) Upon receipt of the recommendation of the Department of Justice, the appeal board shall mail a copy thereof to the registrant together with a letter advising the registrant that, within thirty days after the date of such mailing, he may file with the appeal board a written reply concerning the recommendation of the Department of Justice. Upon receipt of the reply of the registrant or the expiration of the period afforded him to make such reply, whichever occurs first, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but shall not be found to follow, the recommendation of the Department of Justice. The appeal board also shall give consideration to any reply to such recommendation received from the registrant. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant the recommendation of the Department of Justice, a copy of its letter transmitting a copy of such recommendation to the registrant, and any reply to such recommendation received from the registrant.

1627.1 Who May Appeal to the President From Any Determination of an Appeal Board.—(a) When either the State Directors of Selective Service or the Director of Selective Service deems it to be in the national interest or necessary to avoid an injustice, he may appeal to the President from any determination of an appeal board. He may take such an appeal at any time.



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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 783

CASSIUS MARSELLUS CLAY a/k/a MUHAMMAD ALI,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–16a) is not yet reported. The opinion of the district court (Pet. App. 18a–27a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1970, and a petition for rehearing was denied on August 19, 1970. Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including October 3, 1970, and the petition was filed on October 1, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether *Alderman* v. *United States*, 394 U.S. 165, requires disclosure to petitioner of conversations overheard on an electronic surveillance, conducted solely for foreign intelligence purposes, when an *in camera* inspection by the court reveals that the matter overheard could not conceivably have contributed to the denial of petitioner's claims to draft exempt status or to his conviction for refusal to submit to induction.

2. Whether electronic surveillance, without a warrant, undertaken by the President through the Attorney General for the purpose of gathering foreign intelligence information, contravenes the Fourth Amendment or Section 605 of the Communications Act of 1934.

3. Whether a basis in fact exists for the denial by Selective Service of petitioner's claims for ministerial and conscientious objector classifications.

4. Whether an alleged exclusion of Negroes from local and State appeal boards vitiated petitioner's I–A classification.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of knowingly and willfully refusing to submit to induction into the Armed Forces in violation of 50 U.S.C. App. 462(a). He was sentenced to five years' imprisonment and given a $10,000 fine.

Petitioner's conviction was affirmed on appeal; he filed a petition for a writ of certiorari in this Court (No. 271, 1968 Term), seeking further review of the denial of his claims for ministerial and conscientious objector classification as having no basis in fact, and reversal of the conviction due to alleged systematic exclusion of Negroes from membership on the local and State appeal boards which considered his claims. Subsequent to filing its brief in opposition, the government filed a supplemental memorandum advising the Court that petitioner had been overheard on five occasions during electronic surveillances of other persons. This Court then granted the petition, vacated the conviction and remanded the cause to the district court (*sub nom. Giordano* v. *United States,* 394 U.S. 310, 312) for "further proceedings in conformity with *Alderman* v. *United States, Ivanov* v. *United States,* and *Butenko* v. *United States* [394 U.S. 165]." The Court directed (394 U.S. at 312–313) that it would be the duty of the district court to "develop the relevant facts and decide if the Government's electronic surveillance was unlawful" (see *Alderman, Ivanov,* and *Butenko,* 394 U.S. at 170, n. 3), observing that "[o]f course, a finding by the District Court that the surveillance was lawful would make disclosure and further proceedings unnecessary" (394 U.S. at 313).

On remand, the government disclosed both to the court and to petitioner the content of four of the five logs in question. The district court concluded that the

information in these logs did not taint petitioner's conviction in any way (Pet. App. 24a).[1]

The government did not turn over the fifth log to petitioner but submitted it to the court for an *in camera* examination. An affidavit by the Attorney General of the United States stated that the log consisted of petitioner's conversation which was overheard in June 1965 by government agents monitoring a wiretap (not directed at petitioner) maintained for the purpose of gathering foreign intelligence information. The affidavit attested that disclosure of the log information other than to the court *in camera* would prejudice the national interest. An accompanying memorandum also submitted for *in camera* inspection, reflected express approval for installation of this surveillance by the then Attorney General of the United States. The district court concluded that the surveillance was lawful and therefore disclosure was not required (Pet. App. 26a).[2]

---

[1] The court held that "the logs are so totally innocuous they could not have had any bearing on the defendant's conviction under any circumstances." (Pet. App. 24a). The court of appeals agreed (Pet. App. 6a), and petitioner has raised no objection in his petition to this portion of the decision below.

[2] The court expressed the view that (Pet. App. 27a):

> * * * in determining whether to employ wiretapping, the President or the Attorney General must make a judgment based on foreign policy considerations. It would not be feasible for the executive to attempt to bring to the court's attention all the factual and policy considerations supporting the decision. Moreover, it is the executive, not the judiciary, which alone possesses both the expertise and the factual background to assess the reasonableness of such a surveillance. From a purely practical standpoint, it is ridiculous to place on a United States Commissioner the burden of deciding what is and what is not a threat to national security. * * *

The court of appeals affirmed. After examining *in camera* the fifth log, and reviewing the testimony adduced at the district court hearing, the court below was convinced that the overheard conversation did "not in any manner bear upon the issues involved in [petitioner's] draft law violation case, and in no way [had] this wiretap prejudiced [petitioner], helped build a case against him, or assisted in bringing about his conviction" (Pet. App. 12a). It concluded that petitioner's rights and the national security interest were both properly protected by the *in camera* procedure, and that electronic surveillance for the purpose of gathering foreign intelligence information was not prohibited by the Constitution. The court also held that in enacting 47 U.S.C. 605, Congress did not intend to "limit the President's constitutional prerogative to obtain foreign intelligence information" (Pet. App. 14a).

As to issues petitioner had raised on the first appeal, the court declined to reconsider its earlier opinion. It did, however, consider and reject the argument that this Court's intervening decision in *Welsh* v. *United States*, 398 U.S. 333, affected petitioner's case (Pet. 15a, n.9).

ARGUMENT

1. The authority of the President to use electronic surveillance for the purpose of gathering foreign intelligence information is not directly in issue on this petition. Precisely, the question raised is whether an overheard conversation, which by its nature could not have played a part in the prosecution and which is of

a type that a court sitting *in camera* can readily ascertain to be irrelevant to conviction must, under this Court's ruling in *Alderman* v. *United States,* 394 U.S. 165, be disclosed to petitioner before a judicial finding of irrelevancy may be made.

We find it difficult to conceive that the *Alderman* decision intended imposition of so wooden a requirement as to mandate disclosure in the circumstances of the instant case. In our view, the *Alderman* disclosure requirements are premised on this Court's concern that "the *in camera* procedures at issue there would have been an inadequate means to safeguard a defendant's Fourth Amendment rights." *Taglianetti* v. *United States,* 394 U.S. 316, 317. To call for disclosure here of a conversation overheard during a foreign intelligence surveillance—putting the Government to a choice of either disclosure or foregoing its criminal prosecution—would, since a court *in camera* could readily determine that the conversation was not related to the prosecution, unduly extend the scope of the *Alderman* decision. On this record, it cannot reasonably be maintained that " 'the task is too complex, and the margin for error too great, to rely wholly on the *in camera* judgment of the trial court' *Alderman* v. *United States,* * * * [394 U.S.] at 182." *Taglianetti* v. *United States,* 394 U.S. 316, 317. The prosecution was for failure to submit to induction. The only issues on which an electronic surveillance in 1965 could conceivably bear, relate to the genuineness of petitioner's claims to exempt status, either as a minister or as a

conscientious objector. The courts below had no difficulty determining that the overheard conversation did not in any way bear on those issues.[3]

The electronic surveillance questioned here was not the routine surveillance found by *Katz* v. *United States*, 389 U.S. 347, to be constitutionally defective in the absence of a judicial warrant. The wiretap (a nontrespassory wiretap) was maintained for the purpose of gathering foreign intelligence information, under the express authorization of the Attorney General acting, by delegation, for the President.[4] This type of surveillance is fundamentally different from the one involved in *Alderman*. Since the government cannot, in consonance with the national security, disclose the circumstances and content of such surveillances, the

[3] The *in camera* examinations here took place in remand proceedings after the courts below had already heard full argument on the merits. Thus the trial and appellate judges were particularly well suited to determine whether the overheard conversation had a bearing on any issues.

[4] For many years Presidents of the United States have recognized the necessity of electronic surveillance where national security is involved. In 1940, President Roosevelt sent a confidential memorandum to Attorney General Jackson which empowered the Attorney General to authorize the use of wiretapping in matters "involving the defense of the nation." (Pet. 84a). See Rogers, *The Case for Wire Tapping*, 63 Yale L. J. 792, 795, nn. 15, 16 (1954). It has been sanctioned by all Attorneys General since 1940. See Brownell, *The Public Security and Wiretapping*, 39 Cornell L. Q. 195, 199. Petitioner's argument that the Attorney General lacked authorization is specious. President Johnson (the President at the time the surveillance involved here occurred) expressly recognized the necessity of such surveillance where "the national security is at stake." (Pet. 88a).

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government should not be forced to forego prosecution or vacate a valid conviction where, as here, a court can readily ascertain that the conversation overheard has no conceivable relationship to the later criminal prosecution.

2. In any event, disclosure was not required in the instant case because the surveillance was lawful.

a. The Fourth Amendment does not prohibit all searches and seizures; it prohibits only "unreasonable" searches and seizures. In explicating the Amendment's requirements, this Court has never held that a judicial warrant is under all circumstances a precondition to executive action; rather, it has sought to evaluate the feasibility of the warrant requirement in the given circumstances. See, *e.g.*, *Chambers* v. *Maroney*, 399 U.S. 42; *Schmerber* v. *California*, 384 U.S. 757; *Warden* v. *Hayden*, 387 U.S. 294; *Terry* v. *Ohio*, 392 U.S. 1; see also *Colonnade Catering Corporation* v. *United States*, 397 U.S. 72, 75–76.[5]

There are overriding interests which militate against imposing the warrant requirements in matters of foreign intelligence. The nature of the decision to employ electronic surveillance to gather foreign intelligence information is such that it falls peculiarly within the area of executive, as distinguished from judicial, com-

[5] See also *Camara* v. *Municipal Court*, 387 U.S. 523, 533, where this Court observed: "In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant * * *."

petence. It is therefore the type of decision which should not be subject to prior judicial scrutiny in a warrant proceeding. There can be no doubt that the President has the right and the duty to engage in such intelligence gathering operations as he may believe necessary to the national defense or the conduct of international affairs.[6] This power is not dependent upon any grant of legislative authority from Congress, but rather is an inherent power of the President derived from the Constitution itself. See *Chicago and Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 109; *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 319–320; see also *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 890; *In re Debs*, 158 U.S. 564; *Tucker* v. *Alexandroff*, 183 U.S. 424, 435. As Chief Justice Marshall observed in *Marbury* v. *Madison*, 1 Cranch 137, 165–166:

> By the constitution of the United States the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. * * *

In *United States* v. *Belmont*, 301 U.S. 324, 328, this Court recognized that "the conduct of foreign relations was committed by the Constitution to the political departments of the government, and the propriety of what may be done in the exercise of this

[6] In *Totten* v. *United States*, 92 U.S. 105, this Court expressly recognized the President's power to employ agents to gather intelligence information.

political power [is] not subject to judicial inquiry or decision." See also *Oetjen* v. *Central Leather Co.*, 246 U.S. 297; *United States* v. *Pink*, 315 U.S. 203; *Johnson* v. *Eisentrager*, 339 U.S. 763, 789; *United States* v. *Hogans*, 369 F. 2d 359 (C.A. 2).

It would be neither feasible nor desirable for the Executive to attempt to bring to a court's attention all the factual and policy considerations supporting a decision to employ electronic surveillance to gather foreign intelligence information. Moreover, a judge's experience in assessing "probable cause" in the context of a criminal proceeding would be of little value in determining the reasonableness of such a decision. Indeed, the factors to be considered are akin to those which this Court found to preclude judicial review of the President's award of international airline routes in *Chicago and Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 111:

> * * * The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and

> involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry. * * *

Petitioner urges this Court to disturb the delicate balance of power between the coordinate branches of government; he urges that the President (through his Attorney General), after assessing the national security need, be required to come into court for an independent judicial evaluation of the threat to national security.[7] Clearly, our federal system does not contemplate that such a determination be made by the courts;[8] it is apparent that they are by design ill-suited to the task.

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[7] If, as we submit, it is constitutionally permissible for the President to authorize electronic surveillance to gather foreign intelligence information, that power was properly delegated to the Attorney General. It is settled that "[e]ach head of a department is and must be the President's *alter ego* in the matters of that department where the President is required by law to exercise authority." *Myers* v. *United States*, 272 U.S. 52, 133; *Knauff* v. *Shaughnessy*, 338 U.S. 537. See also *Brownell* v. *Rasmussen*, 235 F. 2d 527 (C.A. D.C.), certiorari dismissed, 355 U.S. 859.

[8] This Court had previously recognized that "while the Constitution protects against invasions of individual rights, it is not a suicide pact." *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 160; *Aptheker* v. *Secretary of State*, 378 U.S. 500, 509; it "does not withdraw from the Government the power to safeguard its vital interests." *United States* v. *Robel*, 389 U.S. 258, 267.

Katz v. *United States*, 389 U.S. 347, does not preclude our position. There, the Court expressly noted that "[w]hether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case." (389 U.S. at 358 n. 23). Indeed, Mr. Justice White in a separate opinion urged courts "not [to] require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable" (389 U.S. at 364, concurring opinion).[9] See also the concurring opinion of Mr. Justice Stewart in *Giordano* v. *United States*, 394 U.S. 310, 313.[10] The courts below correctly resolved that the Fourth Amendment's proscription against unreasonable searches and seizures was not violated where an elec-

[9] While the concurring opinion of Justices Douglas and Brennan (389 U.S. at 359–360) expresses disagreement with the view of Justice White, the disagreement is apparently based on the ground that when investigating *crimes* relating to national security the President and Attorney General are cast in an adversary position. Where, as here, however, electronic surveillance is being maintained not to gather information against potential defendants but solely to gather foreign intelligence information the same reasoning should not apply.

[10] Mr. Justice Stewart noted in his concurring opinion in *Giordano* that the Court had never passed on the legality of electronic surveillance expressly authorized by the Attorney General for the gathering of foreign intelligence information. He suggested that the determination of the legality of such a surveillance might properly be made in the district court in an *in camera* proceeding. See also *Taglianetti* v. *United States*, 394 U.S. 316.

tronic surveillance is aimed at preserving the nation's security.

b. Nor does electronic surveillance authorized by the Attorney General to gather foreign intelligence information violate Section 605 of the Communications Act of 1934. That provision was never intended to restrict the President's authority with regard to intelligence operations deemed essential to the proper exercise of his military and foreign affairs powers. Congress has, since 1940, repeatedly been advised that the Department of Justice did not interpret Section 605 as prohibiting government interception of telephone conversations for merely investigative purposes and that the Department was employing such wiretaps. See Letter of Attorney General Jackson to the Chairman of the Judiciary Committee of the House of Representatives, dated February 10, 1941, Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, on H.R. 2266 and H.R. 3099, 77th Cong., 1st Sess., pp. 16–18; Letter of Attorney General Rogers to the Chairman of the Subcommittee on Constitutional Rights of the Committee on the Judiciary, dated September 10, 1959, Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 86th Cong., 1st Sess., p. 1037; Statement of Attorney General Kennedy, Hearings Before the Committee on the Judiciary, United States Senate, on S. 2813 and S. 1495, 87th Cong., 2d Sess., pp. 11–12. Congress has taken no action to indicate disagreement with this construction. Indeed, in 1968, when Congress specifically addressed its attention to the effect of Section 605 on the President's power to

gather intelligence information through wiretaps, it agreed with the Department's long-standing construction. The Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 2511(3)), 82 Stat. 197, 214, provides:

> Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1103; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. * * *

In enacting this provision, Congress recognized that the considerations warranting the application of Section 605 to normal criminal investigations were not germane to investigations aimed only at gathering foreign intelligence information. The Senate Report stated (S. Rep. No. 1097, 90th Cong., 2d Sess., p. 69):

> It is obvious that whatever means are necessary should and must be taken to protect the national security interest. Wiretapping and electronic surveillance techniques are proper means for the acquisition of counter-intelligence against the hostile action of foreign powers. Nothing in the proposed legislation seeks to disturb the power of the President to act in this area. Limitations that may be deemed proper in the field of domestic affairs of a nation become artificial when international relations and internal security are at stake.

3. There is no merit to petitioner's argument that this Court's decision last term in *Welsh* v. *United States,* 398 U.S. 333, requires a reversal of his conviction. As we understand that decision, it does not, as petitioner contends, read out of the exemption provision (50 U.S.C. App. 456(j)) the requirement that a conscientious objection to war must be founded on "religious training and belief." 398 U.S. at 338–340. A registrant is still denied exempt status if his objection "rests solely upon considerations of policy, pragmatism, or expediency" (398 U.S. at 342–343). The statutory exemption applies to persons who on moral and ethical grounds conclude it is wrong to kill a fellow human being in war; it does not extend to those who as a matter of conscience conclude on racial grounds that it is wrong to fight on behalf of white men who are viewed as oppressors.

In any event, there is ample evidence in this record to sustain the board's conclusion that petitioner's political objection runs only to specific wars rather than to war in general. (See our brief in opposition to the first petition for certiorari, No. 271, O.T. 1968, pp. 7–9). As we argue in our brief in *Gillette* v. *United States,* No. 85, O.T. 1970 and *Negre* v. *Larsen,* No. 325, O.T. 1970, presently before this Court on writs of certiorari, Congress had a valid basis for drafting legislation to excuse from combatant training and service only the conscientious objector to war in any form. This is a proper exercise of the power, expressly granted Congress in the Constitution, to raise and support armies.

4. Petitioner again tenders to the Court the issues raised in his first petition for a writ of certiorari—whether a basis in fact existed for the denial of his ministerial and conscientious objector claims and whether an alleged systematic exclusion of Negroes from the local board and the first appeal board to consider his claims vitiated the classification. Those issues have been fully treated in our brief in opposition to the earlier petition (No. 271, O.T. 1968) upon which we rely here.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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No. 783

CASSIUS MARSELLUS CLAY, JR.,
also known as MUHAMMAD ALI,

Petitioner,

—v.—

UNITED STATES OF AMERICA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 783

CASSIUS MARSELLUS CLAY, JR.,
also known as MUHAMMAD ALI,

Petitioner,

—v.—

UNITED STATES OF AMERICA

BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals for the Fifth Circuit is reported at 430 F.2d 165 and is set out in the Appendix (A. 236a). The opinion of the United States District Court for the Southern District of Texas is unreported (R.P. Vol. I, 50-59).*

The opinion of the Court of Appeals at an earlier stage of this case is reported at 397 F.2d 901 (A. 191a). Petitioner was originally convicted upon trial by jury in the United States District Court for the Southern District of Texas, and no opinion exists with respect to that conviction. The District Court denied petitioner's motion for acquittal

* "R.P." refers to the record of the proceedings in the District Court pursuant to the order of this Court in No. 271, O.T. 1968 remanding the case for a determination of whether illegal electronic surveillance of petitioner tainted his conviction. It consists of three volumes of the printed Appendix from the Court of Appeals.

after an oral finding of a basis in fact for petitioner's selective service classification (A. 186a).

Jurisdiction

The judgment of the Court of Appeals was entered on July 6, 1970 and a timely petition for rehearing and rehearing en banc was denied on August 19, 1970. Petitioner's time within which to file a petition for writ of certiorari was extended until October 3, 1970 and the petition was filed on October 1, 1970. Certiorari was granted on January 11, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Constitutional Provision and Statute Involved

The First Amendment to the United States Constitution provides in part:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."

Section 6(j) of the Universal Military Training and Service Act, 50 U.S.C. App. §456(j), provides:

> "Nothing contained in this title . . . shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views

or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections . . . shall, if he is inducted into the armed forces . . . be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of induction, be ordered . . . to perform . . . civilian work contributing to the maintenance of the national health, safety, or interest . . ."

Questions Presented for Review

1. Whether petitioner's conviction for refusal to submit to induction into the Armed Forces should be reversed because there was no basis in fact for the denial of his claim for a conscientious objector exemption? This question subsumes the issues:

   (a) Whether the finding by the Department of Justice that petitioner's beliefs were primarily "political and racial" rather than "religious" was erroneous and violated petitioner's religious freedom?

   (b) Whether the Department of Justice's conclusion that petitioner was not opposed to "participation in war in any form" is in conflict with this Court's decision in *Sicurella* v. *United States*, 348 U.S. 385 (1955), is based upon a constitutionally impermissible interpretation of religious doctrine, and improperly relies upon petitioner's objection to the Vietnam war?

   (c) Whether the Department of Justice erred in concluding that petitioner had failed to sustain the burden of establishing the sincerity of his claim by virtue of the lateness of its assertion and the

fact that he asserted other consistent claims for exemption at the same time?

2. Whether petitioner's conviction must be reversed because the Department of Justice's advice was erroneous with respect to at least one of the grounds upon which it recommended that petitioner should be denied a conscientious objector exemption?

Statement of the Case

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on June 20, 1967 of failing to submit to induction into the armed forces in violation of 50 U.S.C. App. §462. He was sentenced to five years imprisonment and a fine of $10,000. He had been indicted on May 8, 1967 for his refusal on April 28, 1967 to take the traditional "one step forward" which symbolizes induction into the armed forces.

Petitioner originally registered with Local Board No. 47 in Louisville, Kentucky on April 18, 1960 and on March 9, 1962 the board classified him 1-A (A. 3a). As a result of physical examinations which found him unacceptable for induction on January 24, 1966 and again on March 13, 1964 (F. 538, 539),* petitioner was classified 1-Y on March 26, 1964 (A. 3a). But, because of an apparent lowering of the Army's standard for induction (F. 530), petitioner's file was reexamined and without a further physical examination he was found fully acceptable for induction on January 26, 1966 (F. 529). The local board mailed peti-

* "F." refers to the page number of petitioner's Selective Service File, Government Exhibit No. 1 at the original trial (R. 139). "R." refers to the printed record of petitioner's trial originally filed in this Court in No. 271, O.T. 1968.

tioner notice of his acceptability on February 3, 1966 (A. 3a); he did not receive it, however, until February 12, 1966 (A. 11a).

In a letter dated February 14, 1966, petitioner sent to his local board what he referred to as a "request for pre-classification hearing" (A. 9a). He set forth certain information which he considered relevant to an expected reclassification, including his recent divorce and property settlement, the fact that he was the sole support of his mother, and the pendency of a criminal charge against him in Chicago. In addition, he stated:

> "That I am a devoit [sic] Muslim and a follower of the Islamic religious faith under the discipline of the prophet Elijah Muhammad. To bear arms or kill is against my religion and I conscientiously object to any combat military service that involves the participation in any war in which the lives of human beings is [sic] taken. This I do not believe to be rightous [sic]. This has been my faith upwards of 5 years." (A. 10a).

Three days later on February 17, 1966, however, the local board reclassified petitioner 1-A (A. 4a). Only on February 18, 1966 did the board respond to the information contained in petitioner's letter of February 14th by sending him a Special Form for Conscientious Objector (SSS Form No. 150 (A. 4a)). In the form, which he returned to the board on February 28, 1966, petitioner claimed an exemption on the basis of his conscientious opposition to both combatant and noncombatant training and service in the armed forces (A. 12a). He avowed his belief in a Supreme Being and briefly described his religious beliefs and duties as:

> "Muslim—meaning peace—total submission to Will of Allah. Do not take lives of anyone; nor war when not

ordered by Allah (God)—Keep up prayer and pay poor rates (A. 13a).

* * *

"Islam teaches peace. Allah (God) forbids wars, except when Islam is attacked. Holy Quran" (A. 15a).

He dated his conversion to Islam as January, 1964, by confession of faith in Miami, Florida (A. 15a), and in answer to the question concerning what behavior in his life demonstrated the depth of his religious convictions, he explained that:

"I divorced my wife whom I loved because she wouldn't conform to my Muslim faith. Gave up my christian name, and changed my name to Muhammad Ali, my religious name. Declined movie roles not consistent with my faith" (A. 14a).

He also stated that he believed in the use of force "only in sports and self-defense" (A. 14a).

The record of petitioner's appearance before the local board on March 17, 1966 reports that he stated that Muslims fight only in self defense, not war; that they have their own police force, and that no Muslim may carry any lethal weapon. The statement in this report that petitioner "objects to being in service because he has no quarrel with the Viet Cong," is immediately followed by the statement that "he could not, without being a hypocrit [sic], take part in anything such as war or anything that is against the Moslim [sic] religion" (A. 18a).

The board retained petitioner in class 1-A on March 17, 1966 and on March 28, 1966 he appealed its decision. (A. 4a). In his letter of appeal he asserted that he was entitled to a lower classification on medical grounds, for hardship reasons, and because "my religious beliefs decree

that I not serve in any military purpose to promote war. I reaffirm my stand thereon as my prior duty to Allah (God) the Supreme Being over all." (A. 21a).

On May 6, 1966 the Kentucky appeal board reviewed petitioner's file, tentatively determined that he should not be classified in class 1-O as a conscientious objector or in any lower class, and referred the file to the Department of Justice for an advisory recommendation and an FBI investigation (A. 4a-5a, F. 472). After the completion of the investigation, a special hearing was held on August 23, 1966 before former Kentucky Circuit Court Judge Lawrence Grauman in Louisville, Kentucky, at which petitioner, his mother and father, his tax attorney, and an assistant minister of Muhammad's Mosque No. 29 of Miami, Florida, testified (A. 22a-111a).

On the basis of this record, the hearing officer reported:

> "that the registrant stated his views for about one hour in a convincing manner; that he answered all questions propounded to him forthrightly; that there was no evidence of trying to evade . . . questions; and that he was impressed by the registrant's statements (A. 115a). . . . [He] believed that . . . the registrant was of good character, morals and integrity (A. 116a) . . . [and] concluded that the registrant is sincere in his objections on religious grounds to participation in war in any form and he recommended that the conscientious objector claim of the registrant be sustained" (A. 117a-118a).[1]

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[1] This report was never disclosed to petitioner or even made available to the appeal board even though it strongly supports his claim for exemption. *Cf. Brady* v. *Maryland*, 373 U.S. 83 (1963); *Gonzales* v. *United States*, 364 U.S. 59 (1960); *United States* v. *Purvis*, 403 F.2d 555 (2d Cir. 1968).

Despite this completely favorable report, however, the Department of Justice, in a letter to the appeal board from T. Oscar Smith, Chief of the Conscientious Objector Section, dated November 25, 1966, found that petitioner's conscientious objector claim was not sustained and recommended that he not be classified in class 1-O or in class 1-A-O as a conscientious objector to either noncombatant or combatant service (A. 127a). The Department rejected the claim on the ground that petitioner's beliefs did not satisfy the statutory requirements that they be based on "religious training and belief" and that they constitute objection "to participation in war in any form." It characterized petitioners' beliefs, based on the teachings of the Nation of Islam, as "political and racial" rather than religious; and concluded that petitioner did not oppose participation in all wars, but was only opposed to wars on behalf of the United States (A. 121a), and to the Vietnam war in particular (A. 124a). The Department also asserted that petitioner had failed to sustain his burden of showing that his beliefs were sincere because of his alleged failure to consistently manifest his conscientious objector claim (A. 127a).

On the basis of this recommendation, but without setting forth any reasons, the Kentucky appeal board classified petitioner 1-A on January 6, 1967 (F. unnumbered). After the return of his file from the appeal board, on January 12, 1967, the local board refused to reopen petitioner's classification and reclassify him to IV-D as a minister of Islam pursuant to his request of August 23, 1966 (A. 5a) At the request of the National Selective Service Director Hershey, however, on January 19, 1967 the board reopened petitioner's classification but again classified him 1-A (A. 5a-6a). Petitioner appealed to the appeal board for the Southern District of Texas (where he then resided) which, on February 15, 1967, affirmed his 1-A classification (F. unnumbered).

General Hershey appealed petitioner's classification to the National Selective Service Appeal Board which voted to classify petitioner 1-A on March 6, 1967 (A. 7a). Petitioner was ordered to report for induction on April 28, 1967, at which time he refused to submit.

At the subsequent trial, the District Court denied petitioner's motion for acquittal on the ground that there was a basis in fact for the denial of his claims for ministerial and conscientious objector exemptions. With respect to petitioner's conscientious objector claim, the court merely concluded:

> "I don't think he [petitioner] has said in so many words, 'I am an [sic] conscientious objector, I do not believe in killing or bearing arms and therefore I want to be assigned to noncombatant duty or to work of national importance under civilian direction'" (A. 190a).

On appeal, the Fifth Circuit quoted the passage from the Department of Justice's recommendation concerning the "political and racial" nature of the teachings of the Nation of Islam and the alleged objection only to certain wars; it quoted at length from what it termed "a penetrating analysis of the beliefs of the Black Muslims" which emphasized their allegedly anti-white, anti-Christian and segregationist philosophy; and it pointed out that the Justice Department had found that petitioner had not established the sincerity of his beliefs. Without further analysis, it found that "there was more than adequate evidence to justify the denial of his claim" (A. 227a).

A petition for certorari was filed in this Court on July 7, 1968. As a result of the Solicitor General's admission that five conversations of petitioner had been monitored by electronic surveillance, on March 24, 1969 this Court granted the petition for certiorari, vacated the Court of Appeals'

judgment, and remanded the case to the District Court for a determination of the effect of the surveillance on petitioner's conviction. *Giordano* v. *United States,* 394 U.S. 310 (1969).

The District Court held that petitioner's conviction had not been tainted, and on July 24, 1969 it entered a new judgment of conviction and resentenced him to five years' imprisonment and a $10,000 fine (A. 2a). On his second appeal to the Fifth Circuit, petitioner raised again all of the issues which had been decided against him on the first appeal, including the denial of the conscientious objector exemption. The Court declined to reconsider its prior decision, with the exception, however, of determining that the decision in *Welsh* v. *United States,* 398 U.S. 333 (1970) did not affect its disposition of petitioner's conscientious objector claim (A. 249a).

SUMMARY OF ARGUMENT

I

In order to support a claim for a conscientious objector exemption under §6(j) of the Universal Military Training and Service Act (hereafter referred to as the "Act"), a registrant is required to meet three basic tests. He must demonstrate that he is conscientiously opposed to participation in all wars; that this opposition is by reason of religious training and belief; and that he is sincere in his beliefs.

Petitioner was denied such an exemption in the present case as a result of a decision by a Selective Service board[2]

[2] After the Department's adverse recommendation, petitioner was classified 1-A by the appeal board for the Western District of Kentucky on January 6, 1967 (F. unnumbered), by Local Board No. 47 on January 19, 1967 (A. 5a-6a), by the appeal board for

which did not give any reason for its rejection of his claim. But the advisory opinion from the Department of Justice upon which this board relied, recommended that petitioner's claim be denied because of its failure to satisfy any of the statutory criteria. All of the Department of Justice's conclusions, however, were clearly erroneous and they cannot support the denial by the appeal board of a conscientious objector exemption to petitioner. Since there is no other basis in fact in the record for the denial of the exemption, petitioner's conviction should be reversed and the indictment dismissed.

The Department of Justice rejected the findings of the hearing officer that petitioner "is sincere in his objection on religious grounds to participation in war in any form" (A. 117a-118a). Indeed, it asserted that petitioner's beliefs did not satisfy the statutory requirements because they "rest on grounds which primarily are political and racial . . . [and] constitute only objections to certain types of war in certain circumstances . . ." (A. 122a-123a).

Petitioner submits that the Justice Department erred in its conclusion with respect to both the source and the content of his beliefs. Since the Nation of Islam clearly constitutes a religion within the meaning of the Act, the implicit determination that petitioner's beliefs were not "religious" was erroneous. The refusal to recognize that

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the Southern District of Texas on February 15, 1967 (F. unnumbered), and by the National Appeal Board on March 6, 1967 (A. 7a). Presumably, each classification insofar as petitioner's conscientious objector claim was concerned was based upon a review of the same evidence. For the purpose of our consideration here, it is immaterial that there was more than one denial of the exemption after the Justice Department's recommendation. If the Department's advice was erroneous, it is as likely to have infected all of the decisions as it would only one decision. Consequently, for convenience we will refer only to the denial of the exemption by the Kentucky appeal board.

the Nation of Islam is a religion under the Act also affronted the First Amendment's guarantee of religious freedom. Adherence by a registrant to unpopular "political and racial" doctrines as part of his religious beliefs cannot constitutionally provide the basis for discriminating against him with respect to the statutory exemption.

The conclusion that the contents of petitioner's views on war did not qualify him for the exemption was equally defective. Since the only war which the record reflects that petitioner was willing to participate in was a theocratic or holy war, the Department's conclusion that he was not opposed to participation in all war is in conflict with this Court's decision in *Sicurella* v. *United States,* 348 U.S. 385 (1955). Since it is the registrant's views on war that are central to his entitlement to the exemption, it was error for the Department of Justice to consider the doctrines of petitioner's religion in the face of his own unequivocal objection to participation in all wars. However, the doctrines of the Nation of Islam are perfectly consistent with petitioner's beliefs in that they prohibit participation in all war except theocratic war. The Department's contrary conclusion was based on an interpretation of the meaning and significance of religious doctrines that is forbidden by the First Amendment and is in conflict with this Court's decision in *Presbyterian Church* v. *Mary Elizabeth Blue Hull Church,* 393 U.S. 440 (1969). And to the extent that the Department relied on petitioner's expression of opposition to the Vietnam war to support its conclusion that petitioner merely objected to participation in a particular war, it also erred. Opposition to the war in Vietnam is consistent, rather than inconsistent, with conscientious objection to all armed conflict.

Finally, in its recommendation to the appeal board the Justice Department erroneously implied that petitioner

could not, as a matter of law, meet his burden of establishing his sincerity because of the lateness of the filing of his claim. It was also error for the Department to maintain that the appeal board could even consider lateness as evidence from which it could draw an inference of insincerity. Petitioner was not required to bring his claim to the attention of his local board any sooner than he did because he was unacceptable for induction for virtually the entire period from when his conscientious objections to war crystallized until when he did assert the claim. Petitioner's persuasive and fully corroborated explanation of why he did not file his claim until February, 1966, moreover, completely rebuts any inference of insincerity. And the fact that petitioner simultaneously sought several exemptions for different, but not inconsistent, reasons is totally irrelevant to the sincerity with which he asserted his conscientious objector claim.

II

Since no reason was provided by the appeal board for the denial of a conscientious objector exemption to petitioner, it is impossible to determine whether it concluded that petitioner's beliefs did not satisfy the statutory requirements because they were not "religious," because they did not constitute objections to all wars, or because they were not sincerely held. Inasmuch as petitioner clearly made out a *prima facie* case of his entitlement to the exemption, if any of the Department of Justice's advice upon which the appeal board *may* have relied was erroneous, his conviction must be reversed. The integrity of the Selective Service System can only be maintained if courts do not blindly endorse draft board decisions that are based upon errors of law. And serious criminal convictions cannot be supported by determinations so fraught with doubt.

ARGUMENT

I.

There Was No Basis In Fact For the Denial to Petitioner of a Conscientious Objector Exemption.

A. The Finding By The Department of Justice That Petitioner's Beliefs Were Primarily Political and Racial Was Erroneous and Constituted a Violation of the First Amendment.

That petitioner's opposition to war was the result of "religious training and belief" within the meaning of §6(j) of the Act cannot be doubted. It was never open to question that petitioner's beliefs were based on the doctrines of the Lost Found Nation of Islam, and it is clear that the Nation of Islam is a religion within the traditionally accepted meaning of that term. In the language of Chief Justice Hughes in *United States* v. *MacIntosh*, 283 U.S. 605 (1931):

> "The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation" (283 U.S. at 633-34) (dissenting opinion).

And, in *Welsh* v. *United States*, 398 U.S. 333 (1970), after a careful analysis of the legislative history, Justice Harlan concluded that religion within the meaning of §6(j) meant at least the "formal organized worship or shared beliefs by a recognizable and cohesive group" (398 U.S. at 353) (concurring opinion).

It is unnecessary to belabor the point that the Nation of Islam falls within either of these conventional definitions, both of which are far narrower than the definitions or reli-

gion endorsed by this Court in both *Welsh* and *United States* v. *Seeger*, 380 U.S. 163 (1965). It is based on a belief in Allah as the Supreme Being, and the Koran or Holy Qur'an is the chief source of its dogma. The religious doctrines and rituals of the members of the Nation, also known as Muslims or Black Muslims, are derived largely from classical Islam, but their beliefs on certain fundamental points have clearly been shaped by the experience of the Black man in the United States.[3] Despite certain wide departures from the traditions of orthodox Islam, however, Elijah Muhammad, the Nation's spiritual leader, was welcomed to Mecca in 1960 by the powerful Hajj Committee, which is responsible for accepting or rejecting pilgrims journeying to the Holy City.[4]

Consistent with this country's tradition of religious tolerance, courts have not hesitated to recognize the Nation of Islam as a valid religion that is entitled to the same constitutional protection accorded to other religious movements.[5] As one federal court concluded:

"It is sufficient here to say that one concept of religion calls for a belief in the existence of a supreme being

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[3] C. E. Lincoln, *The Black Muslims in America* 219 (1961) [hereafter cited as Lincoln]. The Nation's formal organization can be traced to the early 1930s in Chicago, but its spiritual roots probably lie in the Moorish Science Temple Movement of Noble Drew Ali and the United Negro Improvement Association of Marcus Garvey, both of which flourished after World War I. *Id.* at 50. Ever since the early years of the movement Elijah Muhammad, known as the "Prophet" and the "Messenger of Allah," has been its spiritual leader. Under his guidance, the membership of the Nation of Islam has increased to what was conservatively estimated at 100,000 in 1961, with more than fifty temples in major cities from coast to coast. *Id.* at 217.

[4] B. E. Garnett, "Invaders from the Black Nation: The Black Muslims in 1970," p. 12, Special Report, Race Relations Information Center, Nashville, Tenn. (1970).

[5] *See Cooper* v. *Pate*, 382 F.2d 518 (7th Cir. 1967); *Walker* v. *Blackwell*, 411 F.2d 23 (5th Cir. 1969); *Sostre* v. *McGinnis*, 334

controlling the destiny of man. That concept of religion is met by the Muslims in that they believe in Allah, as a supreme being and as the one true god. It follows, therefore, that the Muslim faith is a religion" (*Fulwood* v. *Clemmer, supra,* 206 F. Supp. at 373).

Yet, faced with the overwhelming evidence that the Nation of Islam is a religion as well as with the conclusion of the hearing officer that petitioner's opposition to war was a result of "religious training and belief," the Department of Justice concluded that petitioner's opposition to war "insofar as it is based on the teachings of the Nation of Islam rests on grounds which primarily are political and racial" (A. 122a). In light of the fact that §6(j) expressly denies an exemption to registrants whose views on war are "essentially political, sociological or philosophical," there can be no doubt the appeal board would conclude that it was the Justice Department's opinion that petitioner should be denied an exemption because his views were "primarily political and racial."[6]

Read as a whole, the Justice Department opinion letter and the resumé of the FBI investigation reinforce the conclusion that the Department was of the view that petitioner's

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F.2d 906 (2nd Cir. 1964); *Sewell* v. *Pegelow,* 391 F.2d 196 (4th Cir. 1961); *Long* v. *Parker,* 390 F.2d 816 (3rd Cir. 1968); *Wallace* v. *Brewer,* 315 F. Supp. 431 (M.D. Ala. 1970); *Knuckles* v. *Prasse,* 302 F. Supp. 1036 (E.D. Pa. 1969); *SaMarion* v. *McGinnis,* 253 F. Supp. 738 (W.D. N.Y. 1966); *Banks* v. *Havener,* 224 F. Supp. 27 (E.D. Va. 1964); *Fulwood* v. *Clemmer,* 206 F. Supp. 370 (D. D.C. 1962) *cf. United States* v. *Freeman,* 388 F.2d 246 (7th Cir. 1967); *United States ex rel. Barr* v. *Resor,* 309 F. Supp. 917 (D. D.C. 1969).

[6] This was especially true before this Court made it clear in *Welsh* v. *United States,* 398 U.S. 333 (1970) that opposition to war that is based on political views or other beliefs that are nonreligious in the conventional sense does not automatically defeat a registrant's claim for exemption.

claim should be denied because it was not "religious." First, *United States* v. *Kauten*, 133 F.2d 703 (2d Cir. 1943) is the only case cited by the Department in support of its determination that petitioner's beliefs did not satisfy the statutory requirements (A. 123a). As this Court recognized in *United States* v. *Seeger*, 380 U.S. 163 (1965), *Kauten* was a case which held "that exemption must be denied to those whose beliefs are political, sociological or philosophical in nature, rather than religious" (380 U.S. at 178). Secondly, the Department did not refer to the Nation of Islam as a religion anywhere in the opinion letter. Not only did it studiously ignore any acknowledgement of the conventional religious aspects of the Nation, but it emphasized what it obviously considered its nonreligious characteristics. Thus, it characterized the teachings of the Nation of Islam as "political and racial objections to policies of the United States as interpreted by Elijah Muhammad" (A. 121a), and it pointed out that the essential views of the Black Muslims are "that the white man is their enemy, and that the black man should disassociate himself from the United States Government and its institutions and secure an independent nation for the black man within the United States" (A. 120a-121a). Finally, the discussion of the doctrines of the Nation of Islam contained in the FBI resumé mentioned only its allegedly anti-white attitude, the fact that some of its members have refused to register under the Selective Service Act, the existence of a "military-like" organization known as the Fruit of Islam, and the erroneous report that Muslims disclaim allegiance to the United States (A. 151a-152a).[7]

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[7] Muslims are directed to respect and obey the laws of the United States (A. 37a). See also Elijah Muhammad, *Message to the Blackman in America*, 163, 180 (1965) (Exhibit D to Special Hearing, A. 41a). It has been observed that Muslims are scrupulous in this obedience. Lincoln, at 248.

Indeed, on at least one occasion the Justice Department at its highest level has explicitly taken the position that the Nation of Islam is not a religion within the meaning of §6(j) of the Act. Thus, in his memorandum in opposition to the grant of certiorari in *Carson* v. *United States*, No. 398, O.T. 1969, the Solicitor General argued that a local board could properly deny a conscientious objector claim that was based on the teachings of the Nation of Islam because the registrant's "alleged opposition to war was not based on ethical principles but on essentially political views" (Memorandum for the United States in Opposition, p. 2). And in affirming that registrant's conviction the Fifth Circuit evidently accepted the Department's argument for it concluded that his beliefs "reflect an opposition to war which smacks of being essentially political, rather than religious . . ." *Carson* v. *United States*, 411 F.2d 631, 633 (5th Cir. 1969), *cert. denied*, 396 U. S. 865 (1969).[8]

The effect of the Department of Justice's letter, therefore, was to recommend that petitioner be denied a conscientious objector exemption on the ground that his opposition to participation in war was not "religious." Such a recommendation was clearly erroneous and cannot support the denial of petitioner's claim because, as we have pointed out, the Nation of Islam satisfies the accepted definition of religion within the meaning of the Act.

By refusing to recognize the Nation of Islam as a religion because of its allegedly "political and racial" teachings,

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[8] During petitioner's trial the United States Attorney even remarked that petitioner:

> "became converted to the Muslim faith in 1964. In my opinion that is where his troubles began. This tragedy and the sadness of having lost his title and having been convicted of a serious felony I think is because of his coming under the influence of the Muslim faith in the United States, which is just as much political as it is religious" (R. 355).

moreover, the Justice Department penalized petitioner because of what he believed, and it deprived him of the benefits of the statutory exemption afforded to the members of all other faiths. In so doing, the Department violated the governmental neutrality toward religion that is commanded by the First Amendment.

As this Court recently stated in *Epperson* v. *Arkansas*, 393 U. S. 97 (1968):

> "Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine and practice. It may not be hostile to any religion or to the advocacy of nonreligion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion and religion, and between religion and nonreligion" (393 U. S. at 103-04).

Thus, the constitutional ideal is "absolute equality before the law, of all religions, opinions and sects," *Abington* v. *School District of Schempp*, 374 U. S. 203, 215 (1963), and the Government may not "penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities," *Sherbert* v. *Verner*, 374 U. S. 398 (1963); *Fowler* v. *Rhode Island*, 345 U. S. 67 (1953). Local boards and courts, therefore, may no more reject the religious beliefs of a registrant because they consider them "political and racial" than they can because they consider them "incomprehensible." *United States* v. *Seeger*, 380 U. S. 163, 194-95 (1965); *see Washington Ethical Society* v. *District of Columbia*, 101 U.S. App. D.C. 371, 249 F.2d 127 (1957).

A central purpose of the First Amendment was to protect the adherents of unorthodox and unpopular faiths such

as petitioner's from persecution and discrimination at the hands of the majority. But on the record in this case, it cannot be said that just such persecution did not account for the Department's adverse recommendation and the subsequent denial of petitioner's conscientious objector claim. The Black Muslims have been commonly, although erroneously, thought to be a fanatical, extremist, black nationalist organization intent upon achieving political separation through violence. *See* E. U. Essien-Udom, *Black Nationalism* 308-323 (Paperback edition 1969). The fear, hatred and distrust that it has engendered among white people has often resulted in political and religious oppression, *see e.g., Wallace* v. *Brewer*, 315 F. Supp. 431 (M.D. Ala. 1970); *Fulwood* v. *Clemmer*, 206 F. Supp. 370 (D.D.C. 1962); *Muhammad Ali* v. *State Athletic Commission*, 316 F. Supp. 1246 (S.D. N.Y. 1970), that recalls that to which the Jehovah's Witnesses were subjected not long ago. *See e.g., Marsh* v. *Alabama*, 362 U. S. 501 (1946); *Fowler* v. *Rhode Island, supra; West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943); *Niznik* v. *United States*, 173 F.2d 328 (6th Cir. 1949). Indeed, the record in this case is replete with evidence of the hostility and resentment that was directed at petitioner both because of his race and his religious affiliation.[9]

The official hostility toward the Muslims has been shared by the federal government, which has itself been deeply involved in the investigation of the Nation of Islam for

[9] The FBI resume, for example, is full of examples of how people thought that the Muslims were hatemongers (A. 130a) who had brainwashed petitioner (A. 134a) and that petitioner was stupid to associate with them (A. 135a). In addition, petitioner's Selective Service file contains hundreds of letters and newspaper articles reflecting racial and religious prejudice against him (A. 233a). These documents had been sent to the local board and placed in petitioner's file pursuant to regulation (R. 175).

many years.[10] This investigation has included systematic FBI wiretapping and electronic surveillance of the Muslims, and around the clock wiretaps on the phones of the Muslim spiritual leader, Elijah Muhammad.[11] Indeed, Mr. Hoover has called the Muslims "a very real threat to the internal security of the Nation," [12] and the use of wiretapping indicates that his conclusion was taken seriously by the Attorney General.[13] *Cf. Wallace* v. *Brewer, supra,* 315 F. Supp. at 441, 440-50.

In such a context, it is little wonder that the Justice Department, which was at the same time treating the Muslims as political terrorists, would conclude that the Nation of Islam was not a religion, or that the appeal board would rely upon that conclusion to deny petitioner a conscientious objector exemption. In *United States* v. *Ballard,* 322 U. S. 78, 87 (1944), Justice Douglas remarked:

> "If one could be sent to jail because a jury in a hostile environment found those [religious] teachings to be false, little indeed would be left of religious freedom"

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[10] *See* Testimony of J. Edgar Hoover at the *Hearings on Appropriations for the Judiciary and Related Agencies, Department of Justice, Before the Subcom. on Departments of State, Justice and Commerce,* 89th Cong., 1st Sess. at 320 (1965); *Id.* 2d Sess. at 256 (1966); *Id.* 90th Cong. 1st Sess. at 622 (1967); *Id.* 2d Sess. at 543 (1968); *Id.* 91st Cong. 1st Sess. at 542 (1969).

[11] Three out of the four logs of illegal surveillances that were disclosed to petitioner in the course of the remand proceedings in this case resulted from wiretaps on the phones of Elijah Muhammad in Phoenix, Arizona and Chicago, Illinois (A. 238a- 239a).

[12] See *Hearings, supra* note 10, 90th Cong. 1st Sess. at 622 (1967).

[13] Prior to the enactment of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §2510 *et seq.*) wiretapping could only be undertaken by federal officers with the express authorization of the Attorney General in cases where national security was at stake (See Memoranda of Presidents Roosevelt, Truman and Johnson (R.P. Vol. I 16-21)).

But that is just what happened to petitioner when the Department of Justice denied the validity of his religious beliefs, the Selective Service System rejected his conscientious objector claim, and the courts below found him guilty.

The First Amendment means at the very least that Government cannot, because of a dislike of religious doctrines, deny to the followers of one religion what it accords to adherents of others. However abhorrent are the beliefs of the Black Muslims to the Department of Justice—however "political and racial" it considers the sources of their doctrines—the Nation of Islam nevertheless constitutes a religion within the contemplation of the Act and its members are entitled to the benefits of the conscientious objector exemption. There was no basis in fact, therefore, for denial of petitioner's claim on the ground that his opposition to participation in war was not based on "religious training and belief."

B. The Department of Justice's Conclusion That Petitioner Was Not Opposed To Participation in War in Any Form is in Conflict With This Court's Decision in *Sicurella* v. *United States*, is Based Upon a Constitutionally Impermissible Interpretation of Religious Doctrine, and Improperly Relies Upon Petitioner's Objection to the Vietnam War.

With respect to the substance of petitioner's objections to war, the Justice Department concluded that he did not satisfy the requirements of §6(j) because he was only opposed to participation in certain types of war in certain circumstances rather than to war in any form (A. 122a-123a). This determination was based entirely upon three considerations: the fact that, in the Department's view, petitioner had admitted that there were some wars in which

he would participate; the Department's view that the teachings of the Nation of Islam only precluded participation in war on behalf of the United States; and the fact that petitioner had expressed the opinion that he could not participate in the Vietnam war. As we point out below, none of these considerations can support the conclusion that petitioner was not opposed "to participation in war in any form." On the contrary, the record convincingly establishes that petitioner's convictions with respect to war satisfied the statutory test.

1. *Petitioner's Objections to Participation in War.*

We start with the premise that it is the convictions of the registrant and not the doctrines of his religion that must be the central concern of the Selective Service System. *United States* v. *Seeger*, 380 U. S. 163, 184-185 (1965). Thus, affiliation with a particular religious sect, even though it may be pacifist, does not automatically entitle one to conscientious objector status, *United States* v. *Simmons*, 213 F.2d 901 (7th Cir. 1954), *rev'd on other grounds*, 348 U. S. 453 (1955), nor does the fact that a registrant's religion does not proscribe participation in war disqualify him for the exemption. *United States* v. *St. Clair*, 293 F. Supp. 33 (E.D. N.Y. 1968). It is, of course, unnecessary that the conscientious objection arise from church membership at all. *United States* v. *Owen*, 415 F.2d 383 (8th Cir. 1969). As this Court has recently held, it is enough that because of beliefs which "function as a religion in his life," a registrant is opposed to participation in all wars. *Welsh* v. *United States*, 398 U. S. 333, 339 (1970).

The record in this case clearly establishes that petitioner was opposed, because of his interpretation of the doctrines of his religion, to participation in all war with the excep-

tion of a theocratic war or a war in which he was directed to fight by Allah.

At the special hearing before Judge Grauman, petitioner discussed his opposition to war in considerable detail. He stated that:

> "the Holy Qur'an do teach us that we do not take part of—in any part of war unless declared by Allah himself, or unless it's an Islamic World War, or a Holy War, and . . . we are not to even as much as aid the infidels or the nonbelievers in Islam, even to as much as handing them a cup of water during battle" (A. 68a).

Later he explained his understanding of what he had described as the "Islamic World War," the "Holy War" or the "War of Armageddon:"

> "We are only preparing for the war of Armageddon divinely. We talk that the battle will be between good and right, truth and falsehood, and we are taught that the battle will be between God and the Devil and so therefore, we hope and pray that we are still with the Honorable Elijah Muhammad, for when that hour and day come that we can be told what side to go to. We are trying to be prepared where we can go on the right side. . . . and we just hope that we are spiritually and physically and internally and mentally and morally able to get on the side of Allah and the Honorable Elijah Muhammad when Armegeddon start . . . for we are only preparing for Allah in spirit . . . in a spiritual way" (A. 106a).

Even in the holy war, which petitioner believed would be a physical conflict between the forces of good and evil (A. 107a), he did not believe that he or his fellow Muslims would actually participate.

Indeed, in the course of the hearing petitioner stated that he would not fight in a war unless:

> "the Honorable Elijah Muhammad looked me in the face and he who I believe is directly from Allah, Almighty God Allah, and if he looked at me and advised me, which I'm sure he wouldn't do, to fight in any kind of war, if he advised me to I would" (A. 101a).

When further pressed on the hypothetical question as to whether he would fight if Elijah Muhammad told him to, petitioner made it clear that he thought any such command was inconceivable. He said:

> "I can speak for him [Elijah Muhammad] right here and now, that I know he would not say anything like that if he is truly following the Holy Qur'an and what he teaches us that God taught him . . . I don't believe that, and I would actually say that I could guarantee you my life that he won't advise me to do something like that . . ." (A. 101a-102a).

Otherwise, petitioner believed in the use of force only for self-defense. He explained:

> "[B]y our teaching and by we believing in God, whose law is self-preservation, we are taught not to be the aggressor, but defend ourselves if attacked and a man cannot defend himself if he knows not how. . . . So, we, the Muslims to keep in physical condition, we do learn how to defend ourselves if we are attacked since we are attacked daily through the streets of America and have been attacked without justification for the past four hundred years" (A. 104a-105a).

Finally, petitioner considered boxing a sport and himself a scientific boxer who was not "violent" in the ring:

> "I never get violent. I never lose my head and I'm known for being a calm, cool boxer and I never feel as

though I'm violent and I never fight and act like I'm violent" (A. 98a).

Petitioner's testimony at the special hearing was perfectly consistent with every statement he had previously made in connection with his conscientious objector claim from the time he first asserted it on February 14, 1966. In his letters of February 14th and March 28th, in his special conscientious objector form (SSS Form No. 150), and at his personal appearance before the local board he maintained that he was opposed to taking any part in earthly wars and to killing human beings (A. 10a, 13a, 18a, 21a). Literally everyone who testified on behalf of petitioner at the special hearing or who was interviewed by the FBI, moreover, was of the opinion that petitioner was opposed to participation in any military service whatsoever (*E.g.* A. 27a, 32a, 54a, 56a, 133a, 134a, 135a, 136a, 137a, 139a).

In the face of his consistent and unequivocal opposition to participation in all wars, the Department of Justice could find only one remark made by petitioner in the entire record to support its conclusion that there are real wars in which petitioner would participate. At one point, petitioner explained that the Holy Qur'an and Elijah Muhammad taught Muslims:

> "that we are not to participate in wars on the side of nobody who—on the side of nonbelievers, and this is a Christian country. . . . So we are not, according to the Holy Qur'an, even as much as aid in passing a cup of water to the—even a wounded" (A. 96a-97a).

Presumably, on the basis of the negative implication of the statement that Muslims were taught not to participate in wars on the side of nonbelievers, the Department concluded that petitioner was willing to fight in wars on behalf

of Muslims. But even assuming that this is a fair reading of petitioner's statement, it is perfectly clear in light of the rest of his testimony that the only war he would ever participate in, even on the side of Muslims, was a Holy War or a war in which he was directed to fight by Allah. Indeed, this fragmentary statement upon which the Department places so much reliance is perfectly consistent with petitioner's previous statement that "the Holy Qur'an do teach us that we do not take part . . . of war unless declared by Allah himself, or unless its an Islamic World War, or a Holy War, and . . . we are not to even as much as aid the infidels or the nonbelievers in Islam, even to as much as handing them a cup of water during battle" (A. 68a). Thus, at the only time that Muslims could ever participate in war, the war of Armageddon, petitioner would take part on the side of Islam; but at all other times he would not give the slightest amount of aid to anybody engaged in war.

In *Sicurella* v. *United States*, 348 U. S. 385 (1955), this Court held that this kind of theocratic conflict was not "war" within the meaning of § 6(j) and that a registrant's willingness to participate in it did not disqualify him for a conscientious objector exemption. In words equally appropriate to this case, the Court said:

> "Granting that these articles picture Jehovah's witnesses as anti-pacifists, extolling the ancient wars of the Isrealites and ready to engage in a 'theocratic war' if Jehovah so commands them, and granting that the Jehovah's Witnesses will fight at Armageddon, we do not feel this is enough. The test is not whether the registrant is opposed to all war, but whether the registrant is opposed on religious grounds, to participation in war. As to theocratic war, petitioner's willingness to fight on the orders of Jehovah is tempered by the fact that, so far as we know, their history records no

such command since Biblical times and their theology does not seem to contemplate one in the future. And although the Jehovah's Witnesses may fight in the Armageddon, * * * [we] believe that Congress had in mind real shooting wars. . . . We believe the reasoning of the Government . . . is so far removed from any possible congressional intent that it is erroneous as a matter of law" (348 U.S. at 390-91).

Petitioner's views on war, based upon his understanding of the doctrines of the Nation of Islam, are indistinguishable in any material respect from those of the Jehovah's Witness in *Sicurella*. He was opposed to all except theocratic war, he would fight only in self-defense, he did not believe in carrying weapons and there was no possibility in his mind that he would ever be commanded to engage in war by his God. Consequently, there was nothing in petitioner's beliefs that could provide a basis in fact for the denial of his claim. To the extent that the Justice Department relied on them, its recommendation is erroneous as a matter of law.

2. *The Teachings of the Nation of Islam.*

In its advice letter the Department took the position that the doctrines of the Nation of Islam precluded only participation in war on behalf of the United States, but allowed participation in earthly wars on behalf of other, presumably Muslim, nations. But as we have pointed out above,[14] it is only petitioner's views on war, not those of his religion, that are relevant to his conscientious objector claim. Thus, even if the Department's interpretation of the Muslim doctrines concerning participation in war

[14] *See* p. 23, *supra*.

was a reasonable one it could not legitimately provide a basis for rejecting petitioner's claim in the face of *his interpretation* that those doctrines precluded him from participating in any earthly war. *See United States* v. *Seeger*, 380 U. S. 165, 184 (1965); *Welsh* v. *United States*, 398 U. S. 333 (1970). Even if on the basis of some theological absolute petitioner misinterpreted the doctrines of the Nation of Islam, he is nevertheless entitled to the exemption because, as the hearing officer found and the record overwhelmingly supports, *he* was opposed to participation in all earthly wars by reason of what *he* believed to be the dictates of his religion.

But even assuming that the doctrines of the Nation of Islam are considered relevant in the abstract to petitioner's conscientious objector claim, the record in this case demonstrates that these doctrines support and are completely consistent with the beliefs petitioner expressed. The contrary conclusion by the Department of Justice not only finds no support in the record, but is based on the kind of interpretation and analysis of the meaning and significance of Muslim religious doctrines that is forbidden by the First Amendment.

In determining whether the doctrines of a particular religion preclude participation in all war within the meaning of § 6(j) of the Act, the Government must be limited to a literal reading of the tenets of the faith. It must take at face value what is stated in the accepted sources of the religion or by the accepted religious spokesmen; it may not supply its own interpretation of the religion or any of its doctrines. *See United States* v. *Ballard*, 322 U. S. 78 (1944). For as this Court has held, the First Amendment forbids courts or other secular authorities from playing any role in determining the "interpretation of particular church doctrines and the importance of those doctrines to

the religion." *Presbyterian Church* v. *Mary Elizabeth Blue Hull Church*, 393 U. S. 440 (1965). This is so because:

> "If civil courts undertake to resolve such controversies [over religious doctrine] . . . the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern" (393 U. S. at 449).

The Justice Department and the Selective Service System, therefore, can no more make petitioner's entitlement to a conscientious objector exemption turn upon their interpretation of certain doctrines of the Nation of Islam, than could the Georgia courts award church property on the basis of the interpretation and significance that they assigned to aspects of church doctrine.

The "neutral principle" which must govern the Government's determination of whether or not the doctrines of a particular religion preclude participation in all war, to the extent such an inquiry is relevant, is that Government inquiry must stop at a literal reading of accepted religious sources. In short, it may not interpret or analyze the doctrines of the religion.

Such a reading of the sources in this record is completely in accord with petitioner's own understanding of the meaning of Muslim doctrines concerning participation in war. Elijah Muhammad explained the meaning of Islam in his *Message to the Blackman in America* (1965) (Ex. D to Special Hearing, A. 41a) in this way:

> "The author of Islam is Allah (God). We just cannot imagine God being the author of any other religion but one of peace. Since peace is the very nature of Allah (God), and peace He seeks for his people and peace is the nature of the righteous, most surely Islam is the religion of peace (p. 68).

* * *

> "The very dominant idea in Islam is the making of peace and not war; our refusing to go armed is our proof that we want peace" (p. 322).

Muslims are, therefore, forbidden to carry weapons or to participate in any war and one of the central dogmas of their faith states:

> "We believe that we who declared ourselves to be righteous Muslims should not participate in wars which take the lives of humans" (*Id.* at 164).

The only use of force that is consistent with the Muslim faith is self-defense, which Elijah Muhammad believes is justified by God and by Divine Law (*Id.* at 217). But even then, Muslims may not use weapons; if they are attacked by armed persons they must rely upon Allah to protect them (*Id.* at 319).[15]

Although Muslim doctrine condemns war among nations and men, an ultimate theocratic war has an important place in the religion. This war is foreseen as one directed by Allah which will destroy the enemies of the black people. After this destruction, which is variously described as a series of natural disasters, the falling of bombs from a wheel-shaped plane in the sky or an ultimate war among nations, black people will live in peace under the guidance of Allah (*Id.* at 270, 291-92).

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[15] The Black Muslim doctrines concerning war can be clearly traced, moreover, to the Holy Qur'an, translated by Maulana Muhammad Ali, which was submitted by petitioner as Exhibit C at the Special Hearing (A. 41a). This version of the Qur'an views war as an evil that can only be justified when it is necessary to defend Muslims against religious persecution. See Maulana Muhammad Ali, *Translation of the Holy Qur'an* 2:190, 2:191, 2:216, 2:217 and commentary at pp. 80-81, notes 238, 239, pp. 90-91, note 277 (5th ed. 1963).

In support of its interpretation that the doctrines of the Nation of Islam only preclude participation in war on behalf of the United States, the Department relies almost entirely upon the article of the Muslim faith that states:

> "We believe that we who declare ourselves to be righteous Muslims, should not participate in wars which take the lives of humans. We do not believe this nation should force us to take part in such wars, for we have nothing to gain from it unless America agrees to give us the necessary territory wherein we may have something to fight for" (A. 120a).

The only thing that is clear about this statement is its absolute opposition to participation in wars which take human lives. The rest of the passage is ambiguous; it can be read simply as a statement of the fact that Muslims do not benefit from wars fought by the United States because they have no stake in the country; it can be read as suggesting that if the Muslims were given some territory there might be some circumstances under which they would fight; or it can be read as saying that Muslims would even fight on behalf of the United States if they were given some territory.

But even if it is read as suggesting the possibility of a future willingness of Muslims to fight under some circumstances, there is no indication that even under such circumstances they would participate in a war that was inconsistent with the teachings of their faith or that would be considered "war" within the meaning of §6(j). Thus, fighting without weapons in self-defense, in defense of friends and co-religionists, or in defense of community would neither violate their religious scruples nor disqualify them from the exemption. *See United States* v. *Owen*, 415 F.2d 383, 390 (8th Cir. 1969); *United States* v. *Haughton*,

413 F.2d 736, 742 (9th Cir. 1969); *United States* v. *Purvis*, 403 F.2d 555, 563 (2d Cir. 1968); *Taffs* v. *United States*, 208 F. 2d 329, 331 (8th Cir. 1953), *cert. denied*, 347 U. S. 928 (1954); *Shepherd* v. *United States*, 217 F.2d 942, 944 (9th Cir. 1954). Moreover, the inference that Muslims might fight at some time if they were given territory is even more speculative than the statement of the registrant in the *Owen* case that it was possible that he might change his mind about participating in war if his country were invaded (415 F.2d at 390). Here, as in *Owen*, the statement relates to a contingency and cannot supply a basis in fact for denial of a conscientious objector exemption (*Ibid*). And the possibility of the Muslims fighting for territory that the United States has given them is at least as unlikely an eventuality as the theocratic war that this Court considered too far removed from Congressional intent to be considered "war" within the meaning of the Act in *Sicurella* v. *United States*, 348 U. S. 385 (1955).

The only other basis for the Justice Department's conclusion that petitioner only objected to participating in war on behalf of the United States are the statements attributed by the FBI resumé to Elijah Muhammad and two co-religionists that the teachings of the Nation of Islam precluded petitioner "from participating in any form in the military service of the United States" (A. 120a). But it is sheer sophistry to argue that this statement (which is clearly correct) implies that the teachings of the Nation of Islam do not preclude Muslims from fighting for some other nation. Moreover, it is patently absurd to attribute such doctrinal significance to the wording of a summary of FBI reports which were based on field interviews by agents (R.P. vol. III 252-53). Indeed, the Justice Department was being less than candid when it gave such weight to this particular phrase while at the

same time it ignored statements in the same context that were inconsistent with its conclusion. Thus, Elijah Muhammad is reported in the same paragraph of the resumé to have said that petitioner had been advised "that no member of the Nation of Islam may bear arms against *anyone*" (A. 149a), and that he believed that petitioner was sincere "in his objection to *any* form of military service" (A. 148a) (Emphasis added). Similarly, the Department overlooked the statements by co-religionists that petitioner would not "violate the tenets of this teachings [Nation of Islam] by engaging in military service" (A. 150a); that because of his practice of the teachings of Elijah Muhammad, petitioner is "completely sincere in his claim of conscientious objector to military service" (A. 152a-153a); and "that war, killing and violence are wrong and in direct contradiction to these teachings" (A. 153a).

It is apparent that none of the specific references to Muslim doctrine or writings can support the Department's conclusion that they precluded only participation in wars on behalf of the United States. Rather, the Department based its conclusion upon its view that the Muslims' opposition to participation in war was primarily motivated by their hostility toward the United States government. Thus, the Department interpreted the writings of Elijah Muhammad to express the "essential" views of the Black Muslims that "the white man is their enemy, and that the black man should disassociate himself from the United States Government and its institutions and secure an independent nation for the black man within the United States" (A. 120a-121a). The Department then interprets the Muslim doctrines opposing participation in all war in light of this supposed fundamental opposition to the United States and concludes that the teachings of the

Nation of Islam only preclude fighting on behalf of the United States "because of political and racial objections to policies of the United States as interpreted by Elijah Muhammad" (A. 121a).

This conclusion, therefore, is based on an interpretation of the tenets of the Muslim faith which conflicts not only with the interpretation of those teachings by petitioner and every other Muslim who testified or was interviewed by the FBI, but also with a literal reading of the Muslim doctrines themselves. As we have pointed out, such an intrusion by Government into purely religious affairs violates the First Amendment, *Presbyterian Church* v. *Mary Elizabeth Blue Hull Church, supra; United States* v. *Ballard,* 322 U. S. 78 (1944).

The treatment of petitioner by the Department of Justice provides a convincing example of the evil that the First Amendment's proscription against the interpretation of religious doctrine by Government is intended to guard against. For when secular authorities undertake to make serious liabilities turn upon the content of religious beliefs, the danger is great that their own moral, ethical and political standards will influence their interpretation of those beliefs. *United States* v. *Ballard,* 322 U. S. 78 (1944); *see Founding Church of Scientology* v. *United States,* 409 F.2d 1146 (D.C. Cir. 1969); *cf. United States* v. *Kuch,* 288 F. Supp. 439 (D.D.C. 1969). What emerges from the record in this case is the feeling, indeed the conviction, that the Government's interpretation of Muslim doctrine was shaped not by what Muslim doctrines said about participation in war, but by its preconceived notion of what kind of an organization the Muslims were. As we have already pointed out, the Department of Justice evidently *believed* that the Muslims were a subversive, military-like organization that was a threat to

national security.[16] And it is probable that the Department even thought that the Muslims might seek to accomplish their goal of a separate black state through violence or insurrection at the command of Elijah Muhammad. This belief is clearly manifested in the opinion letter by its concern with the ambiguous passage about the possibility of Muslims fighting if they had territory and with petitioner's statement that he would fight if commanded to by Elijah Muhammad (A. 120a-121a).

Thus, although any such suspicions have never been substantiated—and have been thoroughly discredited by most observers[17]—it is plain that the Department started its consideration of petitioner's claim with this notion in mind and set about proving it from the record. In short, for the same reasons that led the Department to consider the Muslims a threat to national security, it simply chose to disbelieve the truth of their religious scruples against participating in all wars. But in so doing, the Government entered upon a domain that is forbidden by the First Amendment, and its determination cannot support the denial of petitioner's conscientious objector claim.

3. *The Vietnam War.*

We need not dwell long on the Justice Department's recommendation that petitioner's conscientious objector claim should be denied because his opposition to war was based in part upon objections to the Vietnam War (A. 124a).

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[16] See pp. 20-21, *supra* and note 13.

[17] *See* Lincoln, at 205 (1961); E. U. Essien-Udom, *Black Nationalism*, 308, 311-323, 351-365 (1969); E. Litt, *Ethnic Politics in America*, 89-91 (1970); B. E. Garnett, "Invaders from the Black Nation: The Black Muslims in 1970", p. 25 (Special Report, Race Relations Information Center, Nashville, Tenn., 1970).

This conclusion was based chiefly upon a newspaper article which reported petitioner as saying:

> "I am a member of the Muslims and we don't go to no war unless they are declared by Ali [sic] himself. I don't have no personal quarrel with those Vietcongs.
>
> * * *
>
> "Let me tell you, we Muslims are taught to defend ourselves when we are attacked: Those Vietcongs are not attacking me" (A. 123a).

In addition, at the time of his appearance before his local board, petitioner is reported to have said that he "objected to being in service because he has no quarrel with the Viet Cong" and "that he could not, without being a hypocrit, take part in anything such as war" (A. 18a).

In context, however, both of these statement constitute affirmations of his opposition to participation in all wars and his willingness to fight only in self-defense. In the first statement, he correctly explains that since Muslims are permitted only to fight in self-defense he cannot fight the Vietcong who are not attacking him. And the second statement probably reflects a similar explanation, as recorded by the clerk of the local board. In neither case is there any indication that he objected only to the Vietnam war, or even that his objections to the Vietnam war were grounded upon political or philosophical considerations. *Cf. Gillette* v. *United States,* No. 85, O. T. 1970; *Negre* v. *Larsen,* No. 325, O. T. 1970.

However, as many courts have now recognized, a registrant's opposition to the Vietnam war, is consistent rather than inconsistent with a conscientious opposition to participation in all war, and cannot provide a basis for the denial of a conscientious objector claim. *United States* v. *Cum-*

mins, 425 F.2d 646, 650 (8th Cir. 1970); *United States* v. *Pence*, 410 F.2d 557, 562-63 (8th Cir. 1969); *United States* v. *Haughton*, 413 F.2d 736, 742 (9th Cir. 1969); *Bates* v. *Commander, First Coast Guard District*, 413 F.2d 475, 479 (1st Cir. 1969); *Kessler* v. *United States*, 406 F.2d 151, 155 (5th Cir. 1969); *United States* v. *Prince*, 310 F. Supp. 1161, 1165 (D. Me. 1970); *United States* v. *St. Clair*, 293 F. Supp. 337, 344 (E.D. N.Y. 1968). As the court in *Bates* said:

> "The fact that petitioner wrote letters prior to submitting his application expressing political opposition to the war does not disqualify him from being a conscientious objector. See Fleming v. United States, 344 F.2d 912 (10th Cir. 1965). The fact that he may abhor the Vietnam war and regard it as 'warfare's most horrible manifestation at this time' does not detract from his religious belief which is amply documented. To hold otherwise would require a finding that religious belief cannot co-exist with political opinion. The statement of such a proposition contains its own refutation" (413 F.2d at 478).

Even if petitioner's statements are read as expressing a particular objection to the Vietnam war, therefore, they cannot, as a matter of law, supply a basis in fact for the denial of his conscientious objector claim in light of his amply documented opposition on religious grounds to participation in all war.

C. The Department of Justice Erred in Concluding that Petitioner Had Failed to Sustain the Burden of Establishing the Sincerity of His Claim by Virtue of the Lateness of its Assertion and the Fact that He Asserted Other Consistent Claims For Exemptions at the Same Time.

A third basis for the Justice Department's recommendation to the appeal board that petitioner's conscientious objector claim be rejected was its conclusion that petitioner had not sustained his burden of establishing the sincerity of his claim (A. 127a). The Department attributes his failure to prove his claim chiefly to the fact that petitioner did not assert it until February, 1966, after he had been a conscientious objector for at least two years. In what must have sounded to the lay appeal board like the citation of a rule of law that absolutely precluded petitioner from being clasified as a conscientious objector, the Department concluded:

> "[A] registrant has not shown overt manifestations sufficient to establish his subjective belief where, as here, his conscientious-objector claim was not asserted until military service became imminent. *Campbell* v. *United States*, 221 F.2d 454; *United States* v. *Corliss*, 280 F.2d 808, *cert. denied*, 364 U.S. 884" (A. 127a).

Of course, the correct legal standard is not, as the Justice Department certainly implied, that a registrant who does not assert a conscientious objector claim until military service is imminent can never show "overt manifestations sufficient to establish his subjective belief." Rather, the correct rule is simply that tardiness in the presentation of a conscientious objector claim *may* in some circumstances provide the basis for an inference of insincerity. *United States* v. *Bornemann*, 424 F.2d 1343 (2d Cir. 1970);

United States v. *Broyles*, 423 F.2d 1299 (4th Cir. 1970) (*en banc*); *see Witmer* v. *United States*, 348 U.S. 375 (1955). The assertion of such an erroneous standard upon which the appeal board might naturally rely was clearly prejudicial to petitioner in that it may have aborted the board's consideration of the great deal of other evidence bearing on the issue of petitioner's sincerity. For that reason alone, reversal is warranted. *See United States* v. *Bornemann, supra; United States* v. *Gearey*, 368 F.2d 144 (2d Cir. 1966), *cert. denied*, 389 U.S. 959 (1967).[18]

But this Court need not rely on such a narrow ground. On the facts of this case, it was error for the Department of Justice to even maintain that the failure of petitioner to present his conscientious objector claim prior to February, 1966, was an objective factor that the appeal board could consider as tending to show insincerity.

Petitioner first asserted his conscientious claim in his letter to his local board dated February 14, 1966 (A. 9a). This letter was written several days after petitioner had received the statement of his acceptability for induction and not, as the Justice Department and the court below asserted, after he had been already classified 1-A. He was classified 1-A three days after he wrote the letter, and one day before his local board sent him the special conscientious objector form (A. 4a).

Petitioner's conscientious objections to participation in war crystallized in January, 1964, at about the same time

[18] The court in *United States* v. *Englander*, 271 F. Supp. 182 (S.D.N.Y. 1967) criticized even the citation of legal authority in a similar context because "it could well have a tendency to suggest that a particularized factual judgment has somehow the status of generally applicable 'law'." (271 F. Supp. at 184, n. 2). The Government is even more likely to mislead the appeal board where, as in the present case, the particularized factual judgment is stated as if it were a rule of law.

that he formally became a member of the Nation of Islam and that he was first called for his pre-induction physical examination (A. 85a-86a). When he had first registered for the draft he knew nothing of Islam "and if you had drafted me that day I would have went" (A. 89a). Although not long thereafter, probably sometime in 1961, petitioner became a follower of Elijah Muhammad and accepted the teachings of Islam, he did not have to confront the decision of whether he was a conscientious objector because "I had nothing to worry about and I had nothing about war on my mind" (A. 86a). Indeed, he candidly admitted that:

> "at that moment . . . I'd probably accepted [military service] because my beliefs and my sincerity and my knowledge wasn't strong enough to give me the courage to say, and, the inspiration to say, 'Well, I'll die before I do this' " (A. 86a).[19]

The crux of the issue, then, is whether a lack of sincerity can be inferred from the fact that petitioner did not assert his claim for a conscientious objector exemption at any time between the time it arose in January, 1964 until after he was found to be acceptable for induction in February, 1966. Obviously, the hearing examiner considered this issue important because he questioned petitioner about it closely (A. 85a-95a). And in concluding that petitioner was sincere in his claim he placed great weight on the

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[19] Although petitioner stated that he was a conscientious objector at heart from as early as 1961, in light of all his testimony it seems clear that he never really faced the question squarely or had to make a decision about it until January 1964. He testified:

> "Well, I would say truthfully, the onliest time that I really thought about it—the onliest time that I was conscientious that I would have to make a decision was the first time that they mentioned going to take a physical my first—the first time I had to go get tested" (A. 86a).

statements of two of petitioner's business associates, one of whom was known to him personally and the other by his outstanding reputation. Both associates corroborated completely petitioner's testimony that his conscientious objections to war had arisen early in 1964, and they explained that they had persuaded petitioner not to seek the exemption at that time for fear that the stigma of his affiliation with the Muslims would cause substantial financial losses. Instead, they convinced him to take all of the required steps prior to induction in the hope that it might not be necessary to claim the exemption and ruin his career (A. 131a, 133a-134a). *Cf. United States* v. *Broyles, supra,* 423 F.2d at 1303.

As it turned out, petitioner was not forced to make the decision to file his claim. When he was found not acceptable for induction first in January and again in March, 1964 and was classified 1-Y, he felt that it was unnecessary to seek exemption from service. He explained that:

> "I have no need the first two times that I was called up to, because they never accepted me, but I'm sure that if they had I—as a matter of fact, Allah is my witness here that if they had called me when I was in Miami and I had passed the test then I would have had to do—just say I'm a conscientious objector . . ." (A. 95a).

Similarly, petitioner's business associate was "convinced that [petitioner] would have filed his conscientious-objector claim at that time if he had not failed to pass his Armed Forces physical examination" (A. 131a). Petitioner remained unacceptable for induction from January, 1964 until February 3, 1966, and he notified the board of his conscientious objector claim almost immediately after he received notice of the determination of his acceptability (A. 11a).

Petitioner was, therefore, unacceptable for induction and classified 1-Y virtually from the time his conscientious objections to participation in war crystallized in January, 1964 until he did assert his claim in February, 1966. Since 1-Y is a lower classification than the 1-O classification for conscientious objectors (32 C.F.R. §1623.2), petitioner was not required by the applicable regulation (32 C.F.R. §1625.1 (b)) to present his conscientious objector claim to his local board until after he was classified 1-A. *United States* v. *Bornemann, supra,* 424 F.2d at 1347; *United States* v. *Rutherford,* —— F.2d —— (8th Cir. No. 20,137, Feb. 3, 1971). But, as we have seen, petitioner presented his claim as soon as it became apparent that he would be reclassified. Thus, petitioner is in precisely the same situation as the registrant in *Bornemann,* where the court held:

> "We are thus of the view that Bornemann brought his conscientious objections to the attention of his board as soon as 32 C.F.R. § 1625.1(b) required him to do so. In our view it would be improper to penalize him for failure to act with greater dispatch than the regulations demanded. We conclude, therefore, when the Department of Justice maintained that Bornemann's failure to present his claims prior to August 1966 was an objective factor that the Appeal Board could consider as tending to show insincerity, it erred" (424 F.2d at 1348).

The Department's identical conclusion with respect to petitioner was, therefore, similarly in error.

In any event, in light of the undisputed explanation as to why petitioner did not assert his claim when it first arose, there can be no inference of insincerity. Where there is such a *prima facie* adequate explanation of lateness, only

a disbelief in the credibility of the registrant can support a denial of his claim. *United States* v. *Broyles, supra,* 423 F.2d at 1303. Since petitioner's testimony was accepted by the hearing officer and was corroborated in every detail by the other witnesses at the special hearing as well as by the FBI investigation, there is no basis for questioning his credibility.

The only other factor to which the Justice Department refers as tending to discredit petitioner's sincerity is the evidence that petitioner sought other exemptions at the same time as he sought a conscientious objector exemption. The advice letter suggests that he was insincere because:

> "the record of his efforts to have the local board reconsider his classification indicates that the registrant's primary concern was not his conscientious-objector claim, but the financial hardship which would result from his induction into the Armed Forces" (A. 124a).

But we fail to see how the simultaneous assertion by a registrant of consistent claims for exemption on various grounds, including medical, hardship and conscientious objection, can support an inference of his insincerity. Not only do Selective Service regulations place upon the registrant the duty to provide his local board with information which would result in his being placed in the *lowest* class (32 C.R.R. §§ 1623.2, 1625.1(b)); but he has the statutory right to apply for any exemption for which he qualifies. *See United States* v. *Cummins,* 425 F.2d 646, 650 (8th Cir. 1970); *Capobianco* v. *Laird,* 424 F.2d 1304, 1306 (2d Cir. 1970); *United States* v. *Owen,* 415 F.2d 383, 390 (8th Cir. 1969); *United States* v. *Peebles,* 220 F.2d 114, 118 (7th Cir. 1955); *Taffs* v. *United States,* 208 F.2d 329, 331 (8th Cir. 1953), *cert. denied,* 347 U. S. 928 (1954).

As the court in *Owen* noted:

> "[T]he fact that Owen sought other classifications after being denied a 1-O classification is in no way inconsistent with his claimed conscientious objection. . . . Neither do we feel that registrants claiming conscientious objection may apply for other unrelated classifications only at their peril. To so hold would chill the right Congress sought to protect in enacting § 6(j) and would undermine the principles of individual conscience" (415 F.2d at 390).

A conscientious objector claim may be denied only when there are some objective facts in the record that cast doubt on the sincerity of the claim. *Witmer* v. *United States*, 348 U. S. 375 (1955). Suspicion or speculation cannot suffice, and disbelief must have an honest and rational foundation. *United States* v. *Hesse*, 417 F.2d 141, 144 (8th Cir. 1969); *United States* v. *Corliss*, 280 F.2d 808, 814 (2d Cir. 1960) *cert. denied*, 364 U. S. 884 (1960). On the record of this case, it is apparent that there is no such basis for the disbelief of petitioner's claim. Apart from the lateness of its assertion, which was more than adequately explained, all of the evidence conclusively established his sincerity.

II.

Petitioner's Conviction Must Be Reversed If The Department of Justice's Advice Was Erroneous With Respect to Any One of the Grounds Upon Which It Recommended That Petitioner Be Denied a Conscientious Objector Exemption.

We have argued above that the Department of Justice's advice was erroneous with respect to each of the several grounds upon which it recommended that petitioner's conscientious objector claim be denied and that there was no basis in fact in the record for denial of the claim by the appeal board. However, if the Department's advice was erroneous in *any* material respect, petitioner's conviction must be reversed. This is true even though the appeal board might have legitimately denied the claim upon some other ground.

As this Court held in *Sicurella* v. *United States*, 348 U. S. 385 (1955), where the Department of Justice had erroneously recommended that a registrant be denied an exemption on the ground that he was not opposed to theocratic war:

> "... we feel that this error of law by the Department, to which the Appeal Board might naturally look for guidance on such questions, must vitiate the entire proceedings at least where it is not clear that the Board relied on some legitimate ground. Here, where it is impossible to determine on exactly which grounds the Appeal Board decided the integrity of the Selective Service System demands at least that the Government not recommend illegal grounds" (348 U. S. at 392).

In the present case, petitioner clearly made out a *prima facie* case for his entitlement to a conscientious objector exemption with respect to each of the statutory criteria: the religious basis of the claim, his conscientious opposition to participation in all war; and his sincerity. On the face of the record there is no legitimate ground upon which it is obvious that the appeal board could have properly rejected petitioner's claim. And since the appeal board gave no reasons for its action, there is no way of knowing whether it rejected petitioner's claim on the ground that it was not religious, that he was not opposed to all war, or that he lacked sincerity.

Thus, if the Department of Justice's advice was erroneous upon any one of these grounds upon which the appeal board *may* have relied, the conviction must be reversed even if a court can find a basis in fact to support a denial on one of the other grounds. In *Kretchet* v. *United States*, 284 F.2d 561 (9th Cir. 1960), for example, the court said:

> "We are unable to determine from the record whether the board in refusing appellant's claim for exemption, did so because of appellant's lack of sincerity or because it believed that appellant's conscientious objections were not based upon religious training and belief, or because appellant was not opposed to war in any form, or whether such action was based upon all three grounds or on any two of them. The advice given by the Department of Justice to the appeal board that it could refuse to sustain appellant's claim for exemption on the ground that he was not opposed to war in any form, in our view, was clearly erroneous and fatally infected the adverse recommendation of the Department of Justice" (284 F.2d at 565).

This rule that a registrant's conviction must be reversed where the board may have relied upon an erroneous recommendation by the Department of Justice in denying his conscientious objector claim has been widely followed. *United States* v. *Jakobson,* 325 F.2d 409 (2d Cir. 1963) *aff'd sub nom. United States* v. *Seeger,* 380 U. S. 163 (1965); *United States* v. *Washington,* 392 F.2d 37 (6th Cir. 1968); *United States* v. *Haughton,* 413 F.2d 737 (9th Cir. 1969); *Ypparila* v. *United States,* 219 F.2d 465 (10th Cir. 1954); *United States* v. *St. Clair,* 293 F.2d 337 (E.D. N.Y. 1968). Indeed, it is now the law in many circuits that where a registrant makes out a *prima facie* case for the exemption his conviction must be reversed where the record does not disclose any reason for the denial of his claim. *Scott* v. *Commanding Officer,* 431 F.2d 1132 (3rd Cir. 1970); *United States* v. *Broyles,* 423 F.2d 1299 (4th Cir. 1970) (*en banc*); *United States* v. *Lemmens,* 430 F.2d 619 (7th Cir. 1970); *United States* v. *Abbot,* 425 F.2d 910 (8th Cir. 1970).

The rationale of these cases is, of course, the avoidance of blind endorsement by courts of erroneous draft board decisions. *United States* v. *Broyles, supra,* 423 F.2d at 1304. Courts will not indulge in the speculation that the boards have acted on proper grounds when no reasons are stated, or that erroneous advice by the Department of Justice did not prejudice the registrants. Indeed, even where there is the possibility of prejudice as a result of ambiguities in the Department's advice letter, courts have refused to place their imprimatur on the board's denial of an exemption. As one court concluded, such "a key determination so fraught with doubt cannot be adequate ground for conviction upon a grave criminal charge" *United States* v. *Englander,* 271 F. Supp. 182, 184 (S.D. N.Y. 1967); *see*

also United States v. *Bova,* 300 F. Supp. 936 (E.D. Wis. 1969).[20]

In the present case, therefore, where the appeal board may have relied upon the erroneous advice of the Department of Justice in denying petitioner's conscientious objector claim, the integrity of the Selective Service System requires that his conviction be reversed and the indictment dismissed.

[20] In *Bova* the hearing officer had reported that the registrant had been *a religious* for a time while he attended Catholic seminaries; that he had later displayed an interest in civil rights movements; and that his claim appeared to be based upon his own religious beliefs and not upon Roman Catholicism (300 F. Supp. at 938). The Department, however, wrote that the hearing officer "reported that the registrant was born and reared a Roman Catholic and was religious for a time . . . but thereafter became interested in civil rights movements . . . [and] that registrant's claim for exemption appeared to be based not upon adherence to Roman Catholicism but that he appeared to be sincere in his own belief that he is a conscientious objector . . ." (300 F. Supp. at 939). The court acquitted the registrant on the ground that the Department had conveyed the erroneous impression to the appeal board that the registrant had at one time been a religious person but had abandoned his religion for "civil rights movements." Because of the importance of a registrant's religious beliefs for the conscientious objector exemption, the court concluded that "the erroneous view of the defendant's beliefs that is conveyed by the Justice Department recommendation is by its very nature material" (300 F. Supp. at 941).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed and the case remanded to the District Court with instructions to dismiss the indictment.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 783

CASSIUS MARSELLUS CLAY a/k/a MUHAMMAD ALI,
PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The first opinion of the court of appeals (191a–233a) is reported at 397 F. 2d 901. The opinion of the court of appeals (236a–250a) on remand from this Court (*sub nom. Giordano* v. *United States,* 394 U.S. 310) is reported at 430 F. 2d 165. The opinion of the district court (R.P. Vol. I, 50–59)[1] on remand is unreported.

[1] "R.P." references are to the three-volume, printed record of proceedings in the district court on remand, which is a part of the record before this Court. "SSF" references are to petitioner's Selective Service file, also part of the record before this Court.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1970, and a petition for rehearing was denied on August 19, 1970. Mr. Justice Black extended the time for filing a petition for a writ of certiorari to October 3, 1970, and, on October 1, 1970, the petition was filed. It was granted, limited to a single question, on January 11, 1971. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

The grant of certiorari was limited by the Court to this question:

> Whether petitioner's conviction should be vacated in light of this Court's decision in *Welsh* v. *United States*, 398 U.S. 333 (1970), because the denial to petitioner of a conscientious objector exemption may have been based upon the Department of Justice's erroneous characterization of his objections to participation in wars as "political and racial" rather than "religious"?

STATUTE INVOLVED

50 U.S.C. App. (Supp. V) 456(j),[2] provides in pertinent part:

> Nothing contained in this title * * * shall be construed to require any person to be subject

[2] At the time petitioner's claim was processed by the Selective Service System, Section 6(j) defined the phrase "religious training and belief" to mean "an individual's belief in a relation to a Supreme Being * * *" (50 U.S.C. App. 456(j)). This reference to "Supreme Being" has since been dropped from the

to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.

* * *

STATEMENT

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of knowingly and wilfully refusing to submit to induction into the armed forces, in violation of 50 U.S.C. App. 462(a). On June 20, 1967, he was sentenced to five years' imprisonment and a $10,000 fine.[2]

Petitioner, at the age of eighteen, registered with his local Selective Service board in Louisville, Kentucky on April 18, 1960; on March 9, 1962, he was classified I–A (App. 3a). Two years later, on March 26, 1964, having failed to pass a physical and mental examination under the standards then in effect (SSF 538, 539; App. 3a), he was placed in Class I–Y, a classification assigned to those not currently qualified for military service who could be qualified in time of war or national emergency. 32 C.F.R. 1622.17. Petitioner

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statute; however, the change has no relevance to the instant case. See *United States* v. *Seeger*, 380 U.S. 163.

[2] At the time of sentencing the district judge remarked (App. 196a): "Well, I am going to impose the maximum penalty because under the rules at the end of an appeal if it is reversed, why, of course it is nil. If it is affirmed it is then subject to motion to reduce, and I find that we get into problems when clemency is given at the time of sentencing and then following an affirmance there is another petition for clemency."

held this classification until February 1966, when he became eligible for military service under newly promulgated and revised regulations, changing the minimum qualifying standards for I–Y status. On February 3, 1966, his local board mailed him a statement (DD form 62) that he was now physically acceptable for service (App. 3a).

Petitioner then wrote to his local board, on February 14, 1966,[4] advising for the first time that (App. 10a):

> * * * I am a devoit [*sic*] Muslim and a follower of the Islamic religious faith under the discipline of the Prophet 'Elijah [*sic*] Muhammad. To bear arms or kill is against my religion and I conscientiously object to any combat military service that involves the participation in any war in which the lives of human beings is taken. This I do not believe to be rightous [*sic*]. This has been my faith upward of 5 years. years.

The board mailed to him SS Form 150 (Special Form for Conscientious Objectors) on February 18, 1966, the same day it mailed to him the notice that he had been reclassified I–A; on February 28, 1966, the completed form was returned (App. 12a). In the

[4] In this letter to the board, petitioner also advised that he was then the Heavyweight Boxing Champion of the World; that he was divorced and accountable for alimony in the sum of $1250.00 per month and liable for two lump-sum payments of $50,000; that he had not previously been given a complete physical examination; that his mother was a dependent and he was her sole source of support; that he suffered from a hernia; and that he had been arrested for disorderly conduct in Chicago for which trial was pending (App. 9a–11a).

form, petitioner indicated that he believed in a Supreme Being. He described the nature of his belief as follows: "Muslim—meaning peace—total submission to will of Allah—Do not take lives of anyone; nor war when not ordered by Allah (God)—Keep up prayer and pay poor rates" (App. 13a). The use of force, he stated, is permissible "[o]nly in sports and self defense" (App. 14a). And, in explaining the basic tenets of his religion, petitioner said (App. 15a): "Islam teaches Peace—Allah (God) forbids wars, except when Islam is attacked."

Petitioner requested a personal appearance before the local board in connection with the change in his classification from I–Y to I–A (App. 17a). The request was granted and on March 17, 1966, he appeared before four members of the board. The official minutes of that meeting (App. 17a–18a) reflect that, after discussion of petitioner's claims to physical (I–Y) and hardship (III–A) deferments, petitioner stated that he was no longer Cassius Clay since that was a slave name; he had taken the name of Muhammad Ali. He advised the board (App. 18a) that "[h]is religion teaches * * * not to take part in any way with infidels or any non-religious group" and to "fight only in self defense, not war * * *." He also stated (*ibid.*) that the Muslims have "their own police force and no muslim may carry any lethal weapon. Mohammid [*sic*] is their leader." The board minutes further indicate that he expressed as one of the bases for his objection to military service that "he has no quarrel with the Viet Cong." And he

"stated that he could not, without being a hypocrit [*sic*], take part in anything such as war or anything that is against the Moslim [*sic*] religion." After the appearance, the board voted unanimously to retain petitioner in Class I–A.

Petitioner then appealed to the Kentucky State Appeal Board (App. 4a). In addition to claiming that he had been improperly denied I–Y and III–A classifications, petitioner stated in his letter asserting his desire to appeal that his "religious beliefs decree that I not serve in any military purpose to promote war. I reaffirm my stand thereon as my prior duty to Allah (God) the Supreme being over all" (App. 21a). The appeal board reviewed petitioner's file *de novo* and, on May 6, 1966, tentatively determined that he was not entitled I–O (conscientious objector) status or any lower classification (App. 4a–5a). In accordance with the procedures in effect at that time (50 U.S.C. App. 456(j); 32 C.F.R. (1967 ed.) 1626.25) the matter was referred to the Department of Justice for an advisory recommendation.[5]

On August 23, 1966, petitioner appeared before the Department of Justice hearing officer, accompanied by counsel, his mother and father, an Assistant Minister of the Muslim religion, and his tax attorney. He offered into evidence a book entitled *Message to the Black Man in America,* by Elijah Muhammad, a book entitled *Holy Qur'an* (English Translation) (App. 40a–

[5] The procedure for securing this advisory recommendation of the Department was eliminated by the Military Selective Service Act of 1967, 50 U.S.C. App. (Supp. IV) 456(j).

41a), and a newspaper entitled "Muhammad Speaks" (App. 33a). *Message to the Black Man in America* and *Holy Qur'an* were described as the books which were followed as a basis for the beliefs held by the Nation of Islam and as the basis for the objections that the petitioner expressed in his papers filed with the draft board (App. 40a). Petitioner also said that he relied upon the newspaper "Muhammad Speaks" in formulating his views (App. 161a).[6]

At the hearing, petitioner admitted making the following statement which had been attributed to him in a newspaper article (App. 79a–80a):

> Let me tell you what Muslims are taught; to defend ourselves when we are attacked. * * *
>
> Those Viet Cong are not attacking me. These Viet Cong are fighting a very nasty war over there. There's a lot of people getting killed. Why should we Muslims get involved. Besides, I'm fighting for the Government every day. I'm laying my life on the line for the Government. Nine out of ten soldiers would not want to be in my place in the ring. It's too dangerous.[7]

When inquiry was made as to whether he would accept noncombatant service, he responded (App. 96a–97a):

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[6] The portion of "Muhammad Speaks" upon which the Department of Justice relied in its recommendation appears in substantially the same form in *Message to the Black Man in America*, page 164. All these materials, as well as the transcript of the hearing, were forwarded by the Department of Justice to the appeal board (App. 114a).

[7] Petitioner explained that everything in the statement was true and that Elijah Muhammad condemned him officially "for making such a wild, boastful statement * * *" (App. 80a).

> * * * the Holy Qur'an and the teachings of the Honorable Elijah Muhammad tells us * * * that we are not to participate in wars on the side of nobody who—on the side of non-believers, and this is a Christian country and this is not a Muslim country and the Government and the history and the facts shows [*sic*] that every move toward the Honorable Elijah Muhammad is made to distort and is made to ridicule him and is made to condemn him and the Government has admitted that the police of Los Angeles were wrong about attacking and killing our brothers and sisters and they were wrong in Newark, New Jersey, and they were wrong in Louisiana, and the outright, every day oppressors and enemies are the people as a whole, the whites of this nation. So, we are not, according to the Holy Qur'an to even as much as aid in passing a cup of water to the—even a wounded.[8]

Petitioner also said that while he was sure that Elijah Muhammad would never so direct him, if Elijah Muhammad did advise him "to fight in any kind of war" (App. 101a), he would.

Samuel X. Saxon, an Assistant Minister and Captain of Muhammad's Mosque No. 29 in Miami, Florida, appeared on behalf of petitioner (App. 31a);

[8] At another time in the hearing, petitioner explained that the *Holy Qur'an* taught that he should not take part in war "unless declared by Allah himself, or unless it's an Islamic World War, or a Holy War * * * and * * * we are not to even as much as aid the infidels or the non-believers in Islam, even to as much as handing them a cup of water during battle" (App. 68a).

petitioner endorsed Saxon as being knowledgeable on the Muslim religion (App. 100a–102a). Saxon stated that he was familiar with the teachings of Elijah Muhammad and the Nation of Islam with respect to the performance of military service (App. 32a). He explained that the Muslims, "being righteous people, and trying to do the divine will of Almighty God," are taught and believe that they "shouldn't take part in wars or participate in them" (App. 32a–33a). Although the Fruit of Islam, a group within the Nation of Islam composed of male members (App. 37a), is taught "to prepare for the War of Armageddon" (App. 38a), Saxon declared that the Nation of Islam would not fight in this war; it would be fought between God and the devil. He added, however, that, to prepare spiritually for this War, the Fruit of Islam was given "military training, drill, judo, because we do protect our property and officials of—ministers—we protect our ministers; we protect the Honorable Elijah Muhammad" (App. 38a). There are no weapons of warfare, he said, but the group does believe in self-defense (App. 38a, 42a). And it is governed by a military system wherein the members are controlled by general orders similar to those issued by regular military organizations (*ibid.*).

When asked about a statement that "an Islamic state may ally itself with one or more states to defend a victim" and that warfare was "admissible and a virtue when undertaken to repel aggression," Saxon disavowed this as a principle of the Nation of Islam in the United States (App. 39a–40a). He

expressed the view that "we don't have no state to defend; that's why it have to be rejected" (App. 42a). But, he went on to state that the Muslims "believe that if we are attacked, or fight is forced on us, then we will defend ourselves because we believe we have no life after death so we must protect and defend ourselves so we can keep on living" (*ibid.*). That, however, would not, in the Muslims' view, be "war"; for, as he explained it, "war is when you [*sic*] voluntarily fighting someone * * *" (*ibid.*).

The hearing officer concluded that petitioner was sincere in his conscientious objection (App. 112a–118a). The Department of Justice Conscientious Objector Section reviewed the evidence and, on November 25, 1966, recommended to the Kentucky Appeal Board that petitioner's request for I–O status be denied (App. 127a). On January 10, 1967, petitioner was notified that he was to be retained in Class I–A (App. 5a).

On the same day that he appeared before the Justice Department hearing officer, August 23, 1966, petitioner filed with the Selective Service System a letter in which he claimed, for the first time, that he was entitled to a ministerial (IV–D) exemption because he was a minister of the Nation of Islam (App. 160a). On January 12, 1967, after reviewing petitioner's file, the local board denied this claim and declined to reopen his classification (App. 5a). Shortly thereafter, the National Director of Selective Service requested the local board to reopen petitioner's classification, and, on January 19, 1967, the board did so and again

classified petitioner I–A (App. 5a). Petitioner appealed and asked that the Appeal Board for the Southern District of Texas, where he then resided, hear the appeal. This request was granted and on February 15, 1967, the Texas Appeal Board, after considering petitioner's entire Selective Service file *de novo,* classified him I–A. On February 24, 1967, the National Director instituted an appeal to the National Selective Service Board (the Presidential Appeal Board) (App. 7a, 195a),[9] and on March 6, 1967, the Presidential Appeal Board voted to classify petitioner I–A (App. 7a).

On March 14, 1967, petitioner was ordered to report for induction at Louisville, Kentucky, on April 11, 1967 (App. 7a). He requested and obtained a transfer of his induction to Houston, Texas (App. 8a), and the reporting date was postponed to April 28, 1967. On that date, petitioner reported but refused to submit to induction (App. 8a). His indictment, trial and conviction followed.

On appeal, the Fifth Circuit initially held, insofar as is here relevant, that, under the applicable "basis in fact" review standard, "there was more than adequate evidence to justify the rejection" of petitioner's conscientious objector claim (App. 226a–227a). After remand by this Court on another issue (*sub nom. Giordano* v. *United States,* 394 U.S. 310), the case again reached the court of appeals; the court below reconsidered petitioner's claim in light of the

[9] Petitioner could not take such an appeal under the pertinent regulations, since the state appeal board's decision had been unanimous (see 32 C.F.R. 1627.1, 1627.3).

intervening decision in *Welsh* v. *United States*, 398 U.S. 333, and concluded (App. 249a, n. 9):

> [The Act] grants an exemption from service in the Armed Forces to a registrant "who, by reason of religious training and belief, is conscientiously opposed to participation in *war in any form.*" As we pointed out in our original opinion in this case, the Department of Justice recommendation * * * stated that Clay's beliefs insofar as they are based upon the teachings of the Nation of Islam "rest on grounds which are primarily political and racial." This constitutes objections *to only certain types of wars in certain circumstances, rather than a general scruple against participation in war in any form.*" [Emphasis in original.]

SUMMARY OF ARGUMENT

I

The sole issue presented to the Court in this case is whether the administrative denial of petitioner's conscientious objector claim was without any basis in fact. There is no dispute that petitioner's professed beliefs were founded on basic tenets of the Muslim religion, as he understood them, and derived in substantial part from his devotion to Allah as the Supreme Being. Thus, under this Court's decision in *United States* v. *Seeger*, 380 U.S. 163, his claim unquestionably was within the "religious training and belief" clause of the exemption provision. It clearly did not become more, or less, "religious" by virtue of anything this Court later said in *Welsh* v. *United States*, 398 U.S. 333.

II

Within this framework, there was ample basis to deny petitioner's claim on the ground that he failed to demonstrate a conscientious objection to "participation in war in any form." 50 U.S.C. App. (Supp. V) 456(j). Petitioner undeniably was opposed to participating in wars on behalf of the United States, and there are some statements in this record that might suggest opposition to all wars. But many statements by petitioner, and by the religious leaders on whom he placed total reliance, tended to show merely selective opposition. Thus, petitioner himself stated that he is "not to participate in wars on the side of nobody who—on the side of nonbelievers, * * * this is a Christian country and this is not a Muslim country * * *" (App. 96a–97a); that the Muslims don't go to war "unless declared by Allah himself, or unless it's an Islamic World War, or a Holy War" (App. 68a); that the Muslims "are taught to defend themselves when we are attacked" (App. 79a–80a); and that "[t]hose Viet Cong are not attacking me. * * * Why should we Muslims get involved" (App. 80a).

When compounded with other statements in the record, these statements raised a question, for administrative determination, whether petitioner did or did not object to all wars. There was ample evidence tending to show that petitioner would not object to fighting with real weapons in a defensive war on

behalf of Muslims. It was, therefore, not unreasonable for the Selective Service System to conclude that his was not a general scruple against participation in war, but rather a refusal to fight in wars on the side of white persons. Such a belief is consonant with the creed of his Muslim sect as expressed in the tracts that petitioner placed in the record as the sources of his beliefs.

Of course, "it is not for the courts to sit as super draft boards, substituting their judgments on the weight of the evidence for those of the designated agencies." *Witmer* v. *United States*, 348 U.S. 375, 380–381. The scope of review is limited to a determination whether there exists a basis in fact for the assigned classification discoverable from the administrative record. Even if various statements in the instant record suggest an ambiguity as to the circumstances under which petitioner would be willing to engage in war, that ambiguity cannot accrue to his benefit. As this Court has recognized, it is "* * * the policy of Congress * * * to make review within the Selective Service System final in all cases where there was conflicting evidence or where two inferences could be drawn from the same testimony." *Witmer* v. *United States*, 348 U.S. 375, 383. The burden was on the petitioner to demonstrate that he is entitled to conscientious objector status, and on this record the administrative agency could fairly determine that he failed to meet that burden.

ARGUMENT

I. THE BASIS ON WHICH PETITIONER'S CONSCIENTIOUS OBJECTOR CLAIM WAS DENIED IS UNAFFECTED BY THE DECISION IN WELSH *v.* UNITED STATES, SINCE HIS CLAIM WAS ACKNOWLEDGED TO HAVE RELIGIOUS ROOTS

A. Last Term, this Court considered, in *Welsh* v. *United States,* 398 U.S. 333, whether a registrant, claiming a conscientious objection to all forms of war solely on the basis of deep and abiding moral and ethical convictions, is entitled to a statutory exemption from "combatant training and service" (50 U.S.C. App. (Supp. V) 456(j)), notwithstanding that his objection does not derive from any religion or religious training in the traditional sense. Mr. Justice Black, speaking for a plurality of the Court and viewing the issue as fundamentally indistinguishable from the question presented to this Court five years earlier in *United States* v. *Seeger,* 380 U.S. 163, answered in the affirmative.

Questions can, of course, be raised about the extent to which the *Welsh* decision expanded the *Seeger* definition of "religious training and belief," as that phrase is used in the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. IV) 456(j)). We do not believe, however, that any such question is presented in the instant case. Here, it is undisputed that petitioner's professed beliefs, whatever their scope, are founded on basic tenets of the Muslim religion, as he understands them, and derive in substantial part from his acceptance of Allah as the Supreme Being (App. 13a). Thus, his claim to con-

scientious objector status, though in our view deficient in other respects (see *infra*, pp. 22–32), has roots no less "religious" than those of the three claims considered by this Court in *Seeger*.[10] It is not one which depends on *Welsh* to come within the statutory phrase "religious training and belief."

If, therefore, as petitioner now contends, the Department of Justice's advisory recommendation to his appeal board suggested that "his claim [to conscientious objector status] should be denied because it was not 'religious'" (Pet. Br. 16–17), he would have a claim not only under *Welsh* but equally under this Court's earlier ruling in *Seeger*, decided some months before petitioner filed his conscientious objector claim with his local board.[11] Indeed, petitioner made a

[10] The *Seeger* case was consolidated with *United States* v. *Jakobson* and *Peter* v. *United States*, since all three raised the question whether, under the then applicable statutory language (50 U.S.C. App. (Supp. III) 456(j)), the legislative reference to "Supreme Being" contemplated only the orthodox God. This Court decided it did not. Both Jakobson and Peter, like petitioner in the instant case, asserted that their opposition to war was based on a "Supreme Being" in their own scheme of things, though their "Supreme Being" was not the orthodox God. As for Seeger, this Court declared "that the beliefs which prompted his objection occupy the same place in his life as the belief in a traditional diety holds in the lives of his friends, the Quakers." 380 U.S. at 187. And Jakobson's devotion to a mystical force of 'Godness'" was equated with "Seeger's compulsion to 'goodness'." 380 U.S. at 186. Manifestly, no less can or should be made of petitioner's devotion to Allah; nor has the government ever suggested otherwise.

[11] There is, therefore, no need to discuss the complex question of the retrospective application of *Welsh*. That issue would be present in this case only if petitioner had asserted a *Welsh*-type claim and the Department of Justice had recommended that it be denied as "non-religious."

Seeger claim in the original proceedings below and the issue was fully litigated at that time. And, when the case was here earlier on petition for certiorari (*Clay a/k/a Muhammed Ali* v. *United States,* No. 271, O.T. 1968), petitioner presented to this Court the same issue that he now urges was only recently raised by *Welsh.* In almost identical language, he at that time argued that "[d]espite this recognition of the Muslim religion by the courts * * * the Department, in effect, ruled that beliefs of the Muslims were primarily political and racial, rather than religious" (Pet., No. 271, O.T. 1968, p. 16). In the circumstances of this case, nothing that the Court later said in *Welsh* would add to the consideration of such a claim.

There is, however, no dispute that petitioner's views on war had religious roots. Rather, the case which in our view controls the outcome of this litigation is *Gillette* v. *United States,* No. 85, this Term, decided March 8, 1971. For, the entire focus of the Department's advisory recommendation was on the scope and nature of petitioner's beliefs concerning war and not on whether those beliefs were based upon "religious" belief.

B. The true import of the Department's advisory recommendation becomes apparent when the fragmented portions quoted by petitioner (Pet. Br. 16–18) are read in the context of the recommendation as a whole. Thus, in discussing the book, *Message to the Black Man in America* and the newspaper, "Muhammad Speaks" (*supra,* pp. 6–7), both of which were submitted to the Justice Department hearing officer by counsel for petitioner as the basis for petitioner's objections con-

cerning war (App. 40a), the Department stated that the two documents (App. 120a–121a):

> * * * express essentially the view of the Black Muslims that the white man is their enemy, and that the black man should disassociate himself from the United States Government and its institutions and secure an independent nation for the black man within the United States.

On the basis of this literature, another book submitted by petitioner entitled *Holy Qur'an* (App. 40a), and various statements by the Honorable Elijah Muhammad, the recognized leader of the Black Muslims, the recommendation advised (App. 121a):

> It seems clear that the teachings of the Nation of Islam preclude fighting for the United States not because of objections to participation in war in any form but rather because of political and racial objections to policies of the United States as interpreted by Elijah Muhammad.

The Department then analyzed as well the statements by petitioner to the Department hearing officer and concluded that (App. 122a–123a):

> * * * registrant's claimed objections to participation in war insofar as they are based upon the teachings of the Nation of Islam, rest on grounds which primarily are political and racial. *These constitute only objections to certain types of war in certain circumstances, rather than a general scruple against participation in war in any form.* However, only a general scruple against participation in war in

any form can support an exemption as a conscientious objector under the Act. *United States* v. *Kauten*, 133 F. 2d 703. [Emphasis added.]

A "selective" objection to participation in particular wars, though not to "war in any form," is necessarily grounded on political or secular considerations whether or not it has a religious foundation. As this Court recently pointed out in *Gillette* v. *United States*, *supra*, slip op. 22, such partial opposition "does depend *inter alia* upon particularistic factual beliefs and policy assessments * * *." The "selective" objector does not lack religious motivation or religious basis for his views. In *Negre* v. *Larsen*, No. 325, this Term, decided with *Gillette*, the registrant's opposition solely to the conflict in Vietnam stemmed from his belief in the Catholic doctrine that all wars of aggression are "unjust," that it is only the "just" war—or defensive war—in which a Catholic may in good conscience participate.[12] Yet, this Court ruled that his claim does not come "within the purview of the exempting section, even though [his] objection may have such roots in [his] conscience and personality that it is 'religious' in character." *Gillette* v. *United States*, *supra*, slip op. 10.

This was precisely the point being made by the Department of Justice in the instant case in the earlier quoted portions of its advisory recommendation. Petitioner's conscientious objection, like Negre's,

[12] See our brief in *Gillette* v. *United States* and *Negre* v. *Larsen*, Nos. 85, and 325, this Term, pp. 5–10.

was found to be motivated by the teachings of his religion: personal participation by Muslims in a war of aggression is forbidden; participation in a defensive war is encouraged (see *infra*, pp. 25–27). Conceptually, then, petitioner's beliefs derived from the same fundamental religious distinction between "just" and "unjust" wars. The only difference lay in the manner in which he, as a Muslim, and Negre, as a Catholic, would define a "defensive" war; that necessarily turns on considerations which are by nature "political." It is in this light that the petitioner's objection was characterized as essentially "political," just as the Army had found that Negre's claim was "based upon a personal moral code" (see our brief in *Gillette* and *Negre*, Nos. 85 and 325, this Term, p. 9). In neither case was the "religious" nature of the beliefs being drawn into question; rather the focus was on their selective aspect.

The Department's reliance on *United States* v. *Kauten*, 133 F. 2d 703 (C.A. 2), in its recommendation as to petitioner substantiates this interpretation. That case involved a claim to conscientious objector status by an artist whose opposition was to a particular war on the basis of philosophical and political considerations. While the court there held, as petitioner indicates (Pet. Br. 17), that the claim failed to qualify for exemption under the "religious training and belief" clause of the statute, it then stated (133 F. 2d at 708) that "the provisions of the present statute [the

Selective Training and Service Act of 1940, 54 Stat. 885] are more generous for they take into account the characteristics of a skeptical generation and make the existence of a conscientious scruple against war in any form, rather than allegiance to a definite religious group or creed, the basis of exemption. * * *" Noting that Kauten's objection was only "applicable to this war [World War II]," the court ruled that a belief sufficient to qualify for exemption "must *ex vi termini* be a general scruple against 'participation in war in any form' and not merely an objection to participation in this particular war" (133 F. 2d at 707). The context in which *Kauten* was used in the Department's advisory recommendation (App. 123a) indicates that it was this aspect of the decision that prompted its citation in support of the proposition that only a total opposition to war qualifies for the statutory exemption.[13]

This Court's recent decision in *Gillette* v. *United States, supra,* has disposed of the constitutional and statutory objections to denial of conscientious objector status to those whose opposition is limited to particular wars. Consequently, it remains only to determine whether on the record in this case the courts below correctly found a basis in fact for the administrative determination that petitioner's views did not have the requisite breadth.

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[13] See also the similar reference to *Kauten* in the Department's recommendation at App. 124a.

II. THERE IS ADEQUATE BASIS IN FACT FOR THE ADMINISTRATIVE DETERMINATION THAT PETITIONER DID NOT QUALIFY AS A CONSCIENTIOUS OBJECTOR BECAUSE HIS OBJECTION TO WAR WAS SELECTIVE AND NOT GENERAL.

A. Unlike most other claims to draft exemption or deferment, the disposition of which turns on objective facts, "the ultimate question in conscientious objector cases is the sincerity of the registrant in objecting, on religious grounds, to participation in war in any form." *Witmer* v. *United States,* 348 U.S. 375, 381. That is a question which Congress has chosen to commit, in the first instance, to the discretion and expertise of the Selective Service System. See *Thompson* v. *United States,* 380 F. 2d 86 (C.A. 10); *Lockhart* v. *United States,* 420 F. 2d 1143 (C.A. 9).

In explicating the function of the judiciary in reviewing an administrative classification, this Court has admonished that "it is not for the courts to sit as super draft boards, substituting their judgments on the weight of the evidence for those of the designated agencies." *Witmer* v. *United States,* 348 U.S. 375, 380–381; and see also *Dickinson* v. *United States,* 346 U.S. 389, 396. The scope of review is limited to a determination whether there exists a "basis in fact" for the assigned classification discoverable from the administrative record. *Estep* v. *United States,* 327 U.S. 114, 122; 50 U.S.C. App. (Supp. V) 460(b)(3). That standard of review is now generally recognized as "the narrowest known to the law." See, *e.g., Blalock* v. *United States,* 247 F. 2d 615 (C.A. 4); *United States* v. *Freeman,* 388 F. 2d 246, 248 (C.A. 7);

United States v. *Corliss,* 280 F. 2d 808, 810 (C.A. 2); *United States* v. *Sturgis,* 342 F. 2d 328, 331 (C.A. 3); *DeRemer* v. *United States,* 340 F. 2d 712, 715 (C.A. 8); *United States* v. *Leavy,* 422 F. 2d 1155, 1157 (C.A. 9).

It is, of course, well established that the burden is on the registrant seeking exemption as a conscientious objector to demonstrate his entitlement to the status. *Swaczyk* v. *United States,* 156 F. 2d 17 (C.A. 1), certiorari denied, 329 U.S. 726; *United States* v. *Brown,* 423 F. 2d 751, 754 (C.A. 3); *Olguin* v. *United States,* 392 F. 2d 329 (C.A. 10); see also *Dickinson* v. *United States,* 346 U.S. 389, 395. This does not mean that he must prove the "validity of what he believes" or "the truth of his concepts" (*United States* v. *Seeger,* 380 U.S. at 184), for that is a domain foreclosed from government inquiry. See *United States* v. *Ballard,* 322 U.S. 78, 86. But the nature and content of his professed beliefs are necessarily subject to scrutiny. This Court has long recognized "* * * that the Congress, by relating the registrant's conscientious objection to his religious training and belief, 'has made the belief of his sect relevant.'" *Sicurella* v. *United States,* 348 U.S. 385, 390. That is no less true today than it was thirty years ago in cases where the claim is premised on the tenets of a religious sect. See, *e.g., Negre* v. *Larsen, supra.*

We are entirely in accord with petitioner that the controlling question in any conscientious objector case is the religious beliefs of the individual registrant, and not necessarily the beliefs of the sect with which he claims affiliation. A member of a religion not tradi-

tionally considered to be pacifist in nature, for example, may well qualify as a conscientious objector because of his own—perhaps even erroneous—interpretation of the religious doctrine. See *United States* v. *St. Clair*, 293 F. Supp. 337 (E.D. N.Y.). Or conversely, as petitioner points out (Pet. Br. 23), "affiliation with a particular religious sect, even though it may be pacifist, does not automatically entitle one to conscientious objector status." Cf. *United States* v. *Simmons*, 213 F. 2d 901 (C.A. 7), reversed on other grounds, 348 U.S. 397.

But the instant case simply does not fit that analysis. Here, petitioner submitted to the Justice Department hearing officer, on his own volition, two books and a newspaper (*supra*, pp. 6-7) which were represented as setting forth the religious teachings that served as a basis for the objections he "expressed in his papers filed with the Draft Board" (App. 40a). In addition, he stated unequivocally that he placed reliance on the teachings of the Honorable Elijah Muhammad "solely and one thousand percent" (App. 100a). And, he even went so far as to state that if Elijah Muhammad " * * * looked at me and advised me, which I am sure he wouldn't, to fight in any kind of war, if he advised me to I would" (App. 101a, 102a). In these circumstances, we cannot agree (Pet. Br. 28) that the various writings submitted by petitioner and the teachings of Elijah Muhammad on which he placed such total reliance—in effect incorporating them by reference in his statement of beliefs (App. 80a)—have no relevance to the Department's

assessment of the nature and scope of his objections concerning war.

B. Turning to the Department's evaluation of the evidence before it, including petitioner's own statements, we think it is clear that both the Department and the State Appeal Board could permissibly conclude that petitioner did not establish that he was opposed to all war. While it is undeniably true that petitioner did suggest on several occasions that he was opposed to participation in any war (App. 10a, 13a, 18a, 98a), the record as a whole strongly indicates that the "wars" to which both petitioner and his religious leaders are opposed include only conflicts which are not being waged against the Muslims, rather than shooting wars in general.

Thus, Samuel X. Saxon, an Assistant Minister of the sect, who testified at the Justice Department hearing on the tenets of the Muslim faith, stated that the Muslims believe that "war is when you [*sic*] voluntarily fighting someone," and is to be distinguished from "self-defense" which is when "we are attacked or fight is forced on us" (App. 42a). Petitioner expressed the same view. Muslims are "not to participate in wars on the side of * * * nonbelievers" (App. 96a), he said. Following the teachings of the *Holy Qur'an*, as he interpreted them, the Muslims "are not to even as much as aid the infidels or the nonbelievers in Islam, even to as much as handing them a cup of water during battle" (App. 68a). Instead, he stated, they are taught only to "defend [them]selves when [they] are attacked"

(App. 79a–80a)." Accordingly, he reasoned, I have "no quarrel with the Viet Cong" (App. 18a); they "are not attacking me" (App. 80a). The country that is involved "is a Christian country * * * not a Muslim country" (App. 96a–97a). In these circumstances he asked: "Why should we Muslims get involved" (App. 80a).

This line of thought closely parallels the expressions of Elijah Muhammad, whose letter to the appeal board on behalf of petitioner stated (App. 177a):

> The law of Allah does not permit a Muslim to be an aggressor, fight only those who fight with Muslims, the law of Islam further discredits a Muslim as being a Muslim who will fight on the side of a non-Muslim, though he may be his near of kin, or wars of unbelievers or whether such wars are between disbelievers of Islam or against Islam (the Muslims), of any nation other than Islam, or to bear arms in the armed forces of any nation other than Islam or to perform any non-combatant service or work of any kind under the direction of the authorities acting under any conscription of law of war

[11] Petitioner thus stated: "So, by our teaching and by we believing in God, whose law is self-preservation, we are taught not to be the aggressor, but defend ourselves if attacked and a man cannot defend himself if he knows not how, and we are taught that not only America, but all countries, all civilized governments have armies and have guns around their shores, not necessarily to attack or to be the aggressor, but to defend America or our country or whatever it may be if we are attacked. So, we, the Muslims to keep in physical condition, we do learn how to defend ourselves if we are attacked * * * (App. 104a–105a).

or fighting others, the beliefs of the Lost Found Nation of Islam.

What emerges from these statements is not a clear conscientious objection to "participation in war in any form," as the statute requires. Rather, the record amply supports the inference that, circumstances permitting, petitioner would not object to fighting tomorrow with real weapons in a defensive war on behalf of the Muslims. See *Gillette* v. *United States*, *supra*, slip op. 2, 10. Indeed, that appears as a fundamental tenet of his sect. In the newspaper, "Muhammad Speaks," introduced by petitioner at the Department hearing, the views of the Muslims on participation in war were stated as follows (App. 120a, 185a):

> We Believe that we who declare ourselves to be righteous Muslims, should not participate in wars which take the lives of humans. We do not believe this nation should force us to take part in such wars, for *we have nothing to gain from it unless America agrees to give us the necessary territory wherein we may have something to fight for*. (Emphasis added.)

Petitioner's brief suggests that the "only thing that is clear about this statement is its absolute opposition to participation in wars which take human lives" (Pet. Br. 32), and that "[t]he rest of the passage is ambiguous" (*ibid.*). We submit, however, that upon reading the statement one could reasonably conclude that it is not ambiguous at all. Rather, the second sentence can be read as qualifying the first, explaining the circumstances under which the objection to war

would be less than absolute—an objection not extending to "war in any form."

The fact that one might consider remote the circumstances under which petitioner would fight does not lessen the significance of this factor. Neither *Sicurella* v. *United States,* 348 U.S. 385, nor *United States* v. *Owen,* 415 F. 2d 383 (C.A. 8), suggests that a willingness to engage in a potential defensive shooting war should be ignored. What is controlling is petitioner's present state of mind, whether he can in consonance with his conscience presently envision himself engaging in a real shooting war under certain circumstances. If so, his belief does not qualify as a conscientious objection "to participation in war in any form," within the meaning of the language of the exemption provision. The government is not required to assess the probability or likelihood that the war in which petitioner would participate might not soon occur. Plainly, a registrant who says he could in good conscience fight in a war declared by the United Nations (see *Gillette* v. *United States, supra,* slip op. 2) *is a selective objector. So too, then, is one who claims,* for example, that he can only fight in a defensive war on behalf of Germany, or Russia, or Israel, or the Muslims. This, of course, differs from the situation which *Owen* encompasses, where the registrant's present state of mind compelled him to oppose *all* conceivable wars, but did not foreclose the possibility that at some future date his beliefs in this regard might change (cf. *Gillette* v. *United States, supra,* slip op. 10). Nor is it the same as *Sicurella,* for there

the registrant's opposition to real shooting wars was total and it was only a hypothetical theocratic war—with "weapons * * * spiritual, not carnal"—in which he could envision himself participating (348 U.S. at 389). And the wars in which petitioner would fight are not limited to "defense against immediate acts of aggressive violence" toward himself his family or other persons in his community. *Gillette* v. *United States, supra,* slip op. p. 10.

We agree with petitioner that the Muslim view of the impending Battle of Armaggedon is not inconsistent with a total objection to war; that battle would be a theocratic one between the forces of good and evil, and would not involve the physical participation of individual Muslims (App. 38a, 105a–107a). See *Sicurella* v. *United States,* 348 U.S. 385. The record shows no suggestion that petitioner's willingness to prepare for the Battle of Armaggedon (App. 105a–107a) would disqualify him from conscientious objector status. Rather, the Department's concern was with other statements on the record suggesting petitioner's present willingness to engage in "real shooting wars" (348 U.S. at 391) in defense of the Muslims (App. 15a, 18a, 68a, 79a–80a, 101a, 105a). That these defensive wars would involve the use of carnal weapons seems implicit in petitioner's own statements. Thus, he leaves little doubt that if the Viet Cong were attacking his people, the Muslims would become involved in that war (*supra,* pp. 25–26).

Accordingly, there is, in our view, ample basis for the administrative finding that petitioner did not

have a conscientious scruple against participation in all wars, but only against certain wars depending upon particular circumstances. The record supports the conclusion that his scruples were largely directed against participation in wars on behalf of the United States. Petitioner himself stated that "we are not to participate in wars on the side of nobody who—on the side of nonbelievers, and this is a Christian country and this is not a Muslim country" (App. 96a–97a).

That this attitude, though religiously motivated, could be said specifically to "rest on grounds which primarily are political and racial" (App. 122a), is best reflected in the following testimony by petitioner at the Department hearing (App. 77a):

> * * * the onliest hate I know, as far as the teachings of the Honorable Elijah Muhammad is concerned, * * * is that we hate the way that we've been treated for four hundred years. We hate the way that our pregnant women are being kicked around the streets; we hate the way the innocent negroes have been shot and lynched and killed outright, but the killers are not—never been caught, we hate that we're the first fired and the last hired and we hate the way we have served so faithfully for the country in all wars and have spent three hundred and ten long years and enabling America to have fifty of the richest states on the planet and yet still we are subjected to treatment which cannibals and Africans are treated better.

These are the considerations, he stated, that have led the Muslims to "want to separate" (App. 78a),

"to want to go for ourselves and do for ourselves and get some of this earth that we can call our own * * *" (*ibid.*). Military assistance to the United States is thus forbidden (Pet. Br. 33). As petitioner declared, "* * * the outright, every day oppressors and enemies are the people as a whole, the whites of this nation. So, we are not, according to the *Holy Qur'an*, to even as much as aid in passing a cup of water to the—even a wounded" (App. 97a). See also *Sostre* v. *McGinnes*, 334 F. 2d 906 (C.A. 2), certiorari denied, 379 U.S. 892; and see quotations from the *Supreme Wisdom* containing the teachings of Elijah Muhammad, set forth at App. 223 n. 4.

When this reasoning is viewed in light of petitioner's expressed willingness to fight in defense of the Nation of Islam—in "an Islamic World War" (App. 68a)—it can readily be inferred that his objection is "selective" in nature. Even if, as petitioner's brief seems to argue, various statements in the record suggest an ambiguity as to the circumstances under which he would engage in war, such an ambiguity would not require the administrative findings to be set aside on judicial review. Under the principles established both by the pronouncements of this Court and by Congress (*supra*, pp. 22–23), "review within the Selective Service System [is to be] final in all cases where there [is] conflicting evidence or where two inferences [can] be drawn from the same testimony." *Witmer* v. *United States*, 348 U.S. 375, 383.

Nor is the government foreclosed from concluding that petitioner is a "selective" objector because various

precepts of his Muslim religion (Pet. Br. 30–31) might tend toward the opposite conclusion. Nothing this Court said in *Presbyterian Church* v. *Hull Church*, 393 U.S. 440, forecloses the government from also considering that Muslims are taught "to defend themselves when [they] are attacked" (App. 79a–80a), to fight in a war if advised to do so by Elijah Muhammad (App. 101a), and to participate in a defensive war if given "the necessary territory wherein we may have something to fight for" (App. 120a). The weight which the Department ultimately placed on these latter teachings manifestly did not turn on its own interpretation of the religious doctrine; rather, it resulted from the agency's assessment of the nature and scope of petitioner's personal beliefs as he understood and interpreted the teachings of his sect. This Court has long recognized that to be a legitimate function of the Selective Service System when a registrant puts his religious views in issue, as petitioner has. *Sicurella* v. *United States*, 348 U.S. 385. And, the recent decision in *Gillette* v. *United States*, *supra*, implicitly reflects a continuing awareness that careful scrutiny as to the nature and content of a claimant's religious beliefs is not constitutionally impermissible.[15]

[15] Of course, a decision that the Selective Service System has a basis to conclude that petitioner was not opposed to all war does not preclude other adherents of the Muslim faith from demonstrating that their views meet the requirements of the Act. It is merely a recognition that on the record placed before the Selective Service System by petitioner, it could not be said that Selective Service could not legitimately have concluded that petitioner had failed to meet his burden.

C. Petitioner further objects to the discussion in the Department of Justice's advisory letter about the separate issue whether petitioner sincerely held the beliefs that he asserted in support of his conscientious objector claim. We do not here seek to support the denial of petitioner's claim on the ground of insincerity; our argument is rather that petitioner's objection, however sincere, did not have the requisite generality to qualify him for exemption.[16] We think a fair reading of the Department's recommendation shows that it had the same emphasis. Moreover, contrary to petitioner's characterization of the sincerity discussion in that recommendation, the Department did not assert a firm conclusion that petitioner was insincere but rather simply presented, for the appeal board's consideration, a number of factors pertinent to the matter of sincerity.[17] Thus, we submit, there is nothing in this aspect of the Department's communication that casts doubt on the propriety of petitioner's classification.

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[16] We note that neither the question on which this Court granted certiorari nor any other question in the petition raised any issue about the administrative consideration of petitioner's sincerity.

[17] Petitioner's brief does point to the Department's statement at one point that "[A] registrant has not shown overt manifestations sufficient to establish his subjective belief where, as here, his conscientious-objector claim was not asserted until military service became imminent. *Campbell* v. *United States*, 221 F. 2d 454; *United States* v. *Corliss*, 280 F. 2d 808, certiorari denied, 364 U.S. 884" (App. 127a). However, the suggestion that this "must have sounded to the lay appeal board like the citation of a rule of law that absolutely precluded

The matters referred to by the Department were clearly pertinent to the sincerity question. Tardiness in asserting a claim of conscientious objection has commonly been recognized as one factor to be considered. *Salamy* v. *United States,* 379 F. 2d 838 (C.A. 10); *Bishop* v. *United States,* 412 F. 2d 1064, 1068 (C.A. 9); *United States* v. *Broyles,* 423 F. 2d 1299 (C.A. 4); *United States* v. *Messinger,* 413 F. 2d 927 (C.A. 2), certiorari denied, 399 U.S. 927; *United States* v. *Geary,* 379 F. 2d 915 (C.A. 2), certiorari denied, 389 U.S. 959. And where, as here, the claim was first presented after receipt of a notice of acceptability for induction, there is, at the very least, "a rational inference that imminence of induction * * * led to [the] presentation" *United States* v. *Bornemann,* 424 F. 2d 1343, 1348 (C.A. 2).[18]

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petitioner from being classified as a conscientious objector * * *" (Pet. Br. 39) unreasonably isolates and overemphasizes the importance of the statement on the record. Indeed, if the statement conveyed the meaning that petitioner suggests—that as a matter of law petitioner's claim was deficient—one would question why the Department felt it significant even to suggest any other reasons for denial.

[18] Although petitioner's completed conscientious objector form 150 was not received by the local board until after he had been classified I–A, nevertheless, as petitioner correctly points out, the letter which first apprised the board that he was a conscientious objector "was written several days after petitioner had received the statement of his acceptability for induction and not, as the Justice Department and the court below asserted, after he had already been classified I–A" (Pet. Br. 40). Of course, this technical mistake of a few days has no bearing on the validity of the inference the government sought to develop. The inference of insincerity arises irrespective of whether it was a statement of acceptability or a I–A classification that brought the imminence of induction to the registrant's mind.

Similarly, it was pertinent for the Selective Service System to consider the fact that petitioner filed other deferment claims while he was seeking conscientious objector status; if all the facts warrant a conclusion that a registrant is "deferment shopping" in a concerted effort to avoid service, that may well be a factor in evaluating his sincerity. Here, on receipt of his notice of acceptability for induction, petitioner suddenly filed claims for occupational (II–A) and hardship (III–A) deferments at the same time he claimed conscientious objector status. Both deferment claims rested on facts which clearly could have (App. 9a–11a), and by law should have,[19] been presented to his local board much earlier; and both were based, at least in part, on the probability of substantial financial losses if petitioner was forced to abandon temporarily his professional boxing career (App. 9a–11a). In these circumstances, it seems to us not inappropriate for the Department to suggest to the appeal board that it consider the possibility that financial factors might also have entered into petitioner's motivation for filing the conscientious objector claim.

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[19] Since the regulations require that a registrant "be classified in the lowest class for which he is determined to be eligible * * *" (32 C.F.R. 1623.2), and Classes II–A and III–A are both "lower" than Class I–Y, petitioner was under a continuing duty while he held his I–Y classification to inform his local board of the facts which he felt would warrant a reclassification to II–A or III–A. 32 C.F.R. 1625.1(b).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 783.

CASSIUS MARSELLUS CLAY, JR.,
also known as MUHAMMAD ALI,

Petitioner,

—v.—

UNITED STATES OF AMERICA

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

ARGUMENT

I.

The Effect of the Department of Justice's Characterization of Petitioner's Beliefs as Primarily Political and Racial.

In its brief the Government acknowledges for the first time in any of the proceedings in this case that petitioner's opposition to war had "religious roots." Implicit in this acknowledgment is the concession that petitioner's conviction must be reversed if the Department of Justice recommended that the appeal board deny petitioner's conscientious objector claim because it was not based on religious training and belief within the meaning of the Act.

The Government argues, however, that the Department did not draw into question the religious nature of peti-

tioner's beliefs in its advice letter. Rather, it reasons that the Department's discussion of the "political and racial" basis of those beliefs was only intended to explain their selective aspect.

We think that the Government's assertion in this Court that the religious nature of petitioner's beliefs has never been questioned flies in the face of the record. Indeed, the very boldness with which it now concedes that petitioner's opposition to war had religious roots serves to highlight the care it took to avoid any such concession in the past. Despite its claim that petitioner's beliefs were acknowledged to be religious, nowhere in the record did the Department of Justice ever recognize either that the Nation of Islam was a religion or that petitioner's beliefs were religious. One might well ask why, if there was never any dispute as to the religious nature of petitioner's beliefs, the Department never acknowledged it until the case reached this Court? Although the advice letter does not explicitly state that petitioner's beliefs were not religious within the meaning of the Act, we think that its emphasis on their political and racial aspects coupled with the careful omission of any reference to their clearly religious source was calculated to convey that conclusion.[1]

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[1] As we pointed out in our main brief, the Government has in fact explicitly taken the position that "political" beliefs do not satisfy the "religious training and belief" clause of the Act, even though the beliefs are clearly part of the doctrines of a religion. It appears to read the Act's requirement of a "religious" belief as requiring a belief based upon ethical or moral principles. Thus, in his memorandum in opposition to the grant of certiorari in *Carson* v. *United States*, No. 398, Misc. O.T. 1969, the Solicitor General argued that a Black Muslim's opposition to war based upon the teachings of the Nation of Islam "was not based on ethical principles but on essentially political views." And in its brief in the Fifth Circuit in the same case the Government argued that the registrant's "opposition to war is based on political, sociological, and economic considerations, and not because of religious beliefs." (Brief for Appellee, p. 7). As recently as its brief in *Gillette* v.

But we do not rest our argument upon what the Department of Justice intended to advise the appeal board or even upon whether the advice letter can support the interpretation which the Government now urges. The validity of the Department's advice must be judged by what it was likely to have meant to the lay members of an appeal board in 1966. See *Sicurella* v. *United States*, 348 U.S. 385 (1955); *United States* v. *Jakobson*, 325 F.2d 409 (2d Cir. 1963), *aff'd sub nom. United States* v. *Seeger*, 380 U.S. 163 (1965); *United States* v. *Bova*, 300 F. Supp. 936 (E.D. Wis. 1969); *United States* v. *Englander*, 271 F. Supp. 182 (S.D. N.Y. 1967).

In our main brief, we argued that the appeal board undoubtedly interpreted the Department's advice that peti-

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United States, No. 85, this Term, the Government explained that in order to satisfy the Act the beliefs of a conscientious objector must be based "on the cardinal moral tenet that it is wrong to kill for any purpose at any time" (Br. p. 25). Indeed, in its brief in opposition to certiorari in the present case, the Government left open the argument that petitioner's "political and racial" beliefs might not come within the "religious training and belief" clause even though they were based upon religious doctrine. It argued that the *Welsh* decision does not:

> "read out of the exemption provision (50 U.S.C. App. § 456(j)) the requirement that a conscientious objection to war must be founded on 'religious training and belief.' 398 U.S. at 338-340. A registrant is still denied exempt status if his objection 'rests solely upon considerations of policy, pragmatism, or expediency' (398 U.S. at 342-343). The statutory exemption applies to persons who on moral and ethical grounds conclude it is wrong to kill a fellow human being in war; it does not extend to those who as a matter of conscience conclude on racial grounds that it is wrong to fight on behalf of white men who are viewed as oppressors" (Brief for the United States in Opposition, p. 15).

In other words, until its brief in this Court the Government has taken the position that even if petitioner was opposed to all wars, he could nevertheless be denied an exemption because his beliefs, even though rooted in religious doctrine, were not based on "moral or ethical grounds."

tioner's opposition to war was based upon beliefs which were "primarily political and racial" as placing petitioner within the category of registrants who were not entitled to a conscientious objector exemption because their beliefs were "essentially political, sociological or philosophical." We also pointed out that it was not until *Welsh* v. *United States*, 398 U.S. 333 (1970) that it became clear that beliefs that were based upon political or other views that were not ordinarily considered religious could nevertheless be considered "religious" within the meaning of the Act. While it is true, as the Government points out, that the Nation of Islam clearly falls within the *Seeger* definition of religion, it is not true that before *Welsh* laymen would have been likely to even entertain the notion that the unfamiliar beliefs of the Black Muslims that the Government described as "primarily political and racial" (and failed to recognize as "religious") could be considered "religious." *See United States* v. *French*, 429 F.2d 391 (9th Cir. 1970). Indeed, even the far more sophisticated judges of the Fifth Circuit concluded, on the basis of arguments and evidence similar to that contained in the Department's advice letter, that the beliefs of a Black Muslim conscientious objector "reflect an opposition to war which smacks of being essentially political, rather than religious. . . ." *Carson* v. *United States*, 411 F.2d 631, 633 (5th Cir. 1969), *cert. denied*, 396 U.S. 865 (1969).

Giving the Government the benefit of any doubt, the most than can be said for the Department's advice letter is that it was highly ambiguous with respect to the meaning of its conclusion that petitioner's beliefs were "primarily political and racial." It was at least as likely to be read by laymen as a finding that petitioner's beliefs were not religious as an explanation of why he was only opposed to certain wars. Thus, the rule requiring reversal of a

conviction in cases where the reviewing court cannot say that a draft board did not rely upon an improper reason in denying a conscientious objector exemption is applicable here. Since the appeal board might reasonably have interpreted the letter a rejecting petitioner's claim because it was not "religious," the conviction must be reversed.

The uncertainty as to what the Department was recommending in the present case is similar to the situation in *United States* v. *Jakobson, supra*, where a registrant's conviction was reversed because it was unclear whether the Department recommended rejection of his claim because he was insincere (for which there was evidence) or because his beliefs were not religious (which was erroneous). When the same ambiguity appeared in a Department recommendation in a subsequent case, the court, in words equally applicable here, commented:

> "It is the decision of the lay Appeal Board, whose members presumably read and deliberated on the recommendation, which is the critical operative fact in this case, as it was in *Jakobson*. Whatever undisclosed changes of meaning were in the mind of the Department attorney, the words he used, and the ambiguous message they appeared to convey, were flawed in a substantially identical way. Indeed, the able arguments of government counsel opposing defendant's motion for an acquittal served in a measurable degree to highlight the uncertainties and potential confusion the Department's letter could well have generated even for law-trained people familiar with the precedents. . . ." (*United States* v. *Englander*, 271 F. Supp 182, 185 (S.D. N.Y. 1967.))

We think that the Department's advice letter in the present case was equally ambiguous with respect to a

crucial element of petitioner's conscientious objector claim and, as a result, the appeal board may have rejected his claim for an improper reason. We conclude with the court in *Englander, supra*, therefore, that such a "key determination so fraught with doubt cannot be adequate ground for conviction upon a grave criminal charge" (271 F. Supp. at 185).

II.

Petitioner Was Opposed to Participation in War in Any Form Within the Meaning of the Act.

The Government agrees that the controlling question in this case is whether, on the basis of his particular religious beliefs, petitioner "can in consonance with his conscience presently envision himself engaging in a real shooting war under certain circumstances" (Gov't. Br. p. 28). It concludes, however, that the record supports the inference that "petitioner would not object to fighting tomorrow with real weapons in a defensive war on behalf of the Muslims" (*id.* at p. 27). The Government reaches this conclusion only by reading petitioner's unequivocal testimony concerning his belief in personal self-defense as indicating a willingness to engage in defensive wars on behalf of Muslims, and by attributing to him a supposed doctrine of the Nation of Islam that encouraged defensive wars even though such a doctrine is completely inconsistent with everything petitioner himself said.

The doctrines of a religion are certainly relevant in explaining the religious basis for a registrant's conscientious objections to participation in war. They are, no doubt, also relevant in helping to resolve ambiguities in a registrant's testimony concerning his religious beliefs or when he has explained his beliefs solely by referring to the teachings of his faith. Our position is, however, that where, as in

the present case, the registrant's testimony concerning his opposition to participation in war and his interpretation of the meaning of the teachings of his religion is clear and unambiguous, the arguably inconsistent doctrines of his religion cannot provide a basis in fact for the denial of a conscientious objector exemption. *See Gillette* v. *United States*, —— U.S. ——, 39 L.W. 4305, 4310 (March 8, 1971.)

But this is precisely what the Government does when it argues that petitioner "incorporated by reference" the religious writings which he testified provided the basis for his religious beliefs and then uses the alleged ambiguities in these writings as a basis in fact for the denial of his claim. It is as if a Christian conscientious objector testified that his opposition to participation in all war was based on the teachings of the Bible and the Government supported the denial of the claim on the ground that the Bible, which the registrant had "incorporated by reference," does not preclude fighting in all wars. Indeed, since there are few religions whose teachings are unambiguous in any respect, the denial of a conscientious objector claim could always be supported on the ground that the administrative agency resolved the ambiguities in religious doctrine against the registrant.

We have argued in our main brief that petitioner's own testimony and statements assert a clear and unambiguous opposition to participation in all wars except theocratic wars or wars in which he is commanded to fight by his God. We pointed out that there was no basis in fact for the conclusion of the Department of Justice, relied upon by the appeal board, that petitioner's opposition to participation in war was selective, based in part upon an objection to fighting on behalf of the United States and in part upon an objection to fighting in the Vietnam War.

The Government does not now seriously challenge that argument. Instead, it seeks to support the denial of petitioner's claim for a reason which, as far as we can determine, it raises in this Court for the first time. Thus, it argues that the teachings of petitioner's religion forbid only participation in wars of aggression, but encourage participation in defensive wars (Gov't Br. p. 20). Petitioner's willingness to participate in war, the Government now tells us, is based upon whether he considers it a "just" or "unjust" war (*ibid.*).

In view of this Court's decision in *Gillette* v. *United States*, No. 85, and *Negre* v. *Larsen*, No. 325, decided March 8, 1971, that a registrant who is willing to participate in wars of national defense and in "just" wars is not entitled to a conscientious objector exemption, it is clear why the Government now seeks to characterize petitioner's religious beliefs in such a way as to make this case applicable. But it is unnecessary for this Court to consider the position that is urged by the Government for the first time. *See Sicurella* v. *United States*, *supra*, 348 U.S. at 391-92. The issue is whether there was any evidence to sustain the denial of petitioner's claim on the basis of the Department of Justice's recommendation to the draft board. And as we have already argued, there was no such evidence. (Pet. Br. pp. 29-38)

Even if we consider the Government's new argument as having been fairly presented to the appeal board, it finds absolutely no support in the record. In its zeal to fit petitioner into the mold of the *Gillette* case, the Government has tortured the meaning of what petitioner said beyond recognition.

Indeed, the Government's new interpretation of petitioner's beliefs is so strained that it is in conflict with its own previous position. For when this case was in this

Court on petition for certiorari for the first time, the Solicitor General, in referring to the information in the FBI resume that the male members of petitioner's religion are given military instruction, commented that:

> "Petitioner and another witness [Samuel X. Saxon] both testified at the hearing on his claim of exemption that this was only training in self-defense, and *that there was no thought of actually engaging in any type of war. This testimony was never questioned.*" (Supplemental Memorandum for the United States, No. 271, O.T. 1968, p. 4; n. 3.)

Not only does the Government now question petitioner's testimony that he had "no thought of actually engaging in any type of war," but its entire case rests upon its claim that "petitioner would not object to fighting tomorrow with real weapons on behalf of the Muslims" (Gov't Br. p. 27).

The only support it finds for this argument, moreover, is in statements by petitioner and others that reflect the Muslim belief in personal self-defense. Thus, the Government relies on Samuel X. Saxon's testimony to suggest that the Muslims are opposed to aggressive wars but will fight a defensive war (Gov't Br. p. 25), despite Mr. Saxon's explicit disavowal of any such principle as part of the doctrine of the Nation of Islam (A. 39a-40a). Mr. Saxon made perfectly clear that the Muslims' belief in defending themselves was limited to defending "your life, your home, your family," with no thought of engaging in war (A. 42a).

Similarly, in the newspaper report quoting petitioner as saying that Muslims are taught "to defend ourselves when we are attacked" that the Government relies upon so heavily (Gov't Br. pp. 7, 13, 25-26, 29, 32), he was obviously referring to, and his statement is entirely consistent with, fighting in personal self-defense. At the hearing petitioner

acknowledged making the statement (A. 80a) and went on to explain that his religion taught Muslims to defend themselves against attacks only through the use of judo, karate, boxing and wrestling (A. 104a-107a).[2]

A review of the statements on the record referred to by the Government reveals absolutely nothing to show "petitioner's present willingness to engage in 'real shooting wars' . . . in defense of the Muslims." (Gov't Br. p. 29) And the Government's inference that petitioner would use "carnal weapons" is flatly contradicted in the very statements to which it refers, as well as by every other statement in the records on that subject. (A. 18a, 38a, 42a-43a, 48a, 49a, 51a, 70a-71a, 103a-107a.)

The similarity between the Government's argument here and its argument in *Sicurella* v. *United States*, 348 U.S. 385 (1955), bears mention. In *Sicurella*, the Government argued that the appeal board could have properly concluded that the willingness of the Jehovah's Witnesses to use force in defense of their "Kingdom Interests" and fellow brethren "could involve more than individual self-defense, and contemplated such mass use of force as could be nothing less than warfare." (Brief for the United States, No. 250, O.T. 1954, p. 25.) Now, the Government seeks to expand the Muslim's belief in defending themselves when they are attacked into a belief in fighting full-blown defensive wars.

But it is even harder to find support for the conclusion that Muslims are willing to fight in some wars than it was to make the same argument about the Jehovah's Witnesses. For one thing, the Muslim belief in individual self-defense is much narrower than the belief of the Jehovah's Witnesses that permits use of force to defend "Kingdom In-

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[2] It was this testimony that the Solicitor General referred to as indicating "no thought of actually engaging in any type of war." (See p. 9, *supra*.)

terests." In addition, the Muslim opposition to participation in war is based on a pacifist strain that is completely absent from the theology of the Jehovah's Witnesses. *See Sicurella* v. *United States, supra,* 348 U.S. at 390. As we have pointed out, Muslims oppose participation in war because war takes human lives and is antithetical to the ideal of peace embodied in Allah and in Islam (Pet. Br. pp. 30-31). What this Court said in *Sicurella* about the Jehovah's Witnesses' belief in defense of "Kingdom Interests" is equally applicable to the Muslim belief in self-defense:

> "[It] has neither the bark nor the bite of war as we unfortunately know it today. It is difficult for us to believe that the Congress had in mind this type of activity when it said the thrust of conscientious objection must go to 'participation in war in any form.'" (348 U.S. at 390)

And certainly the Muslim doctrine represents no more than a "[w]illingness to use force in self-defense, in defense of home and family, or in defense against immediate acts of aggressive violence toward other persons in the community" which this Court recently recognized is consistent with a conscientious objector claim. *Gillette* v. *United States, supra,* 39 L.W. at 4308.

Finally, even on the Government's own terms, the war which it envisions petitioner and the Muslims participating in is so hypothetical, abstract and remote that it cannot be considered "war" within the meaning of the Act. In essence, the Government sees petitioner fighting, at the direction of Elijah Muhammad, in a real war in defense of a Muslim nation. (Gov't Br. pp. 13, 20, 25, 27, 32). It finds support for this supposed war by reading Elijah Muhammad's statement that "[w]e do not believe this nation should

force us to take part in such wars, for we have nothing to gain from it unless America agrees to give us the necessary territory wherein we may have something to fight for" as a reservation in the opposition of Muslims to fighting in all wars. But as we pointed out in our main brief (Pet. Br. pp. 32-33), this statement can be read only as indicating that *if* Muslims are given territory they *might* fight to defend it. There is no material difference between this statement and the statement of the registrant in *United States* v. *Owen*, 415 F.2d 383, 390 (8th Cir. 1969), that *if* this country were invaded he *might* fight in its defense. The most that can be said is that the Muslims, like Owen, "oppose participating in all wars, but cannot say with complete certainty that their present convictions and existing state of mind are unalterable." *Gillette* v. *United States*, *supra*, 39 L.W. at 4309. And as this Court has said the "[u]nwillingness to deny the possibility of a change of mind, in some hypothetical future circumstances," is not inconsistent with a present unwillingness to participate in war in any form. *Ibid.*

Even a present willingness to participate in a war in defense of the Nation of Islam, however, would be virtually indistinguishable from the willingness of the Jehovah's Witnesses to fight in theocratic wars. In either case, any fighting would be only at the command of God to defend the religion and its followers against attack. It is as absurd to suggest that such an abstract religious war is in the same category and is as likely to occur as a war in which Germany, Russia or Israel is involved (Gov't Br. p. 28), as it was to suggest that the War of Armageddon in which the Jehovah's Witnesses were willing to participate was a reasonably imminent war of earthly nations.[3] Indeed, even

[3] In *Sicurella* the Government argued that in their religious writings "[t]here is a summons to Jehovah's Witnesses to be pre-

the willingness of the Jehovah's Witnesses to use "carnal weapons" at Jehovah's command has been held to be an insufficient basis for denying a conscientious objector claim. *Kretchet* v. *United States*, 284 F.2d 561, 564 (5th Cir. 1960). And as in the case of the Jehovah's Witnesses, history discloses no command to Muslims by Elijah Muhammad to participate in war in defense of Muslims in this country or elsewhere, and there appears to be no likelihood that this will ever occur (A. 101a-102a).

A willingness to participate in such a religious war, moreover, in no way depends "upon particularistic factual beliefs and policy assessments which presumably were overridden by the government that decides to commit lives and resources to a trial of arms." *Gillette* v. *United States*, *supra*, 39 L.W. at 4312. Unlike the registrants in *Gillette* and *Negre* who were only opposed to participating in the Vietnam War because of their judgments as to that particular war, the Government contends that petitioner is opposed to all wars except one in which he is called upon by Allah to defend his religion and his coreligionists against attack. No particularistic judgments of any sort are involved in the decision to participate in this war; it is not based upon political or even moral considerations. Rather, it is based simply upon a theocratic command to defend the faith.[4]

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pared to participate in a quite reasonably imminent war of Armageddon which, although occasionally referred to at certain points as a distant spiritual conflict of angels and Satan, is as persuasively referred to elsewhere as an outright war of earthly nations sanctioned by Jehovah." (Brief for the United States, *supra*, p. 30; see also pp. 29-32.)

[4] Indeed, it is difficult to see how "political and racial" considerations have anything to do with what the Government now claims to be the basis of petitioner's "selective" opposition to war. See Gov't Br. pp. 19-20. If Muslims will participate in a defensive war only at the direction of their God when they are attacked collectively, petitioner's decision whether or not to fight does not entail any "political and racial" judgments.

We think, therefore, that a supposed war in defense of the Nation of Islam cannot rationally be distinguished from the theocratic war of the Jehovah's Witnesses. The Government's distinction between Black Muslim and Jehovah's Witness conscientious objectors on the basis of whether their religious doctrines contemplate real or abstract religious wars "entangles government in difficult classifications" and creates a real "danger of unintended religious discrimination." *Gillette* v. *United States, supra;* 39 L.W. at 4311. We submit that unless petitioner's conviction is reversed, that danger will have been realized in this case.

III.

The Appeal Board May Have Relied Upon the Department's Erroneous Advice That Petitioner's Claim Could Be Denied Because He Was Insincere.

In our main brief we argued that the Government erroneously recommended to the appeal board that it could deny petitioner's conscientious objector claim on the grounds of insincerity. That the board may have correctly relied, as the Government now argues, upon a determination that his objection to war did not have the requisite generality, does not cure the effect of the erroneous advice. For when the appeal board is presented by the Department with a permissible and an impermissible ground for denying a conscientious objector claim, a conviction must be reversed when there is no way of determining upon which ground the board ruled. *Sicurella* v. *United States*, 348 U.S. 385, 392 (1955); *United States* v. *Jakobson*, 325 F.2d 409, 416 (2nd Cir. 1963), *aff'd sub nom. United States* v. *Seeger*, 380 U.S. 163 (1965); *United States* v. *Englander*, 271 F. Supp. 182, 184 (S.D. N.Y. 1967).

The Government now appears to concede for the first time that petitioner was sincere in his conscientious objector claim. It does not argue that the appeal board could properly have denied his claim on the grounds of insincerity.[5] (Gov't Br., p. 33) Rather, it argues that the only ground that the Department tendered to the board as the basis for denying his claim was the alleged selectivity of petitioner's objections to war (*ibid.*). In the same way that it now takes the position that the Department did not advise the board to reject petitioner's claim because it was not "religious," it also takes the position that the Department did not advise the board that it could reject petitioner's claim on the grounds of insincerity. Thus, it argues that since only one reason was given to the board for the rejection of petitioner's claim, there is no occasion for this Court to consider the possibility that the board acted upon an erroneous ground.

But we have difficulty reading the Department's advice letter as asserting anything but "a firm conclusion that petitioner was insincere" (Gov't. Br. p. 33). After discussing petitioner's sincerity for three pages, the Department concluded categorically that:

> "[A] registrant has not shown overt manifestations sufficient to establish his subjective belief where, as here, his conscientious-objector claim was not asserted until military service became imminent. *Campbell* v. *United States*, 221 F.2d 454. *United States* v. *Corliss*, 280 F.2d 808, *cert. denied*, 364 U.S. 884.

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[5] It is interesting to note that in the district court the Government supported the denial of petitioner's conscientious objector claim almost entirely upon the basis of the argument that the appeal board had a "basis in fact" for a finding that petitioner was insincere (R. 448-459). The identical argument was presented on appeal in the Fifth Circuit. (Brief for Appellee, No. 24,991 pp. 29-39).

> The burden of clearly establishing his conscientious-objector claim is upon the registrant. *Swaczyk* v. *United States*, 156 F.2d 17, *cert. denied*, 329 U.S. 726. *The Department concludes that this registrant failed to sustain that burden.*" (A. 127a) (Emphasis added).

The Government would apparently have us read the Department's conclusion as to the failure of petitioner to sustain his burden of proof as relating only to the discussion of the selectivity of his objections to war contained pages earlier in the letter and not to the discussion of his failure to establish his sincerity contained in the preceding paragraph. The clear language of the letter, however, will simply not bear such a construction. *See United States* v. *Jakobson, supra*, 325 F.2d at 411-412; *United States* v. *Englander, supra*, 271 F. Supp. at 184-85.

The Government also questions why the Department would have recommended the denial of petitioner's claim for any other reason if, in fact, it was recommending that it be denied on the grounds of insincerity. (Gov't Br. pp. 33-34, n. 17.) The Government overlooks the fact, however, that it was commonplace for the Department to recommend the denial of conscientious objector claims on the basis of several independent grounds. See *United States* v. *Jakobson, supra*; *United States* v. *Owen*, 413 F.2d 383 (8th Cir. 1969); *Kretchet* v. *United States*, 284 F.2d 561 (8th Cir. 1960); *Shepherd* v. *United States*, 217 F.2d 942 (9th Cir. 1954); *United States* v. *Englander, supra*. The more pertinent question is why the Department would question petitioner's sincerity in its advice letter if it did not intend to tender the issue of his insincerity to the board for decision.

It cannot be denied, therefore, that the appeal board may have denied petitioner's conscientious objector claim

because it concluded that he was insincere. But, as we argued in our main brief, there is no basis in fact whatsoever to support such a conclusion (Pet. Br. pp. 39-45). After having had an opportunity to evaluate petitioner's credibility on the basis of his demeanor during his extensive testimony, the Department's own hearing officer concluded that petitioner was completely sincere in his claim. Indeed, he specifically considered and rejected as reflecting adversely on petitioner's sincerity the only two factors which the Government even claims are pertinent to the issue: the lateness in the presentation of the claim and the possibility that financial considerations might have motivated its filing. He was fully satisfied with petitioner's explanation of why he did not file his claim until February, 1966 (see Pet. Br. pp. 40-42), and he obviously believed that the financial sacrifices that petitioner had made because of his beliefs were persuasive evidence of his sincerity (A. 116a-117a, notes 2 and 3). Surely it was error for the Department to advise the appeal board that, on the basis of these factors alone, it could reject the determination of the officer specifically designated by the Department, pursuant to the Act (50 U.S.C. App. §456(j)), to evaluate petitioner's sincerity.[6] *See United States ex rel. Tobias* v. *Laird*, 413 F.2d 936, 940 (4th Cir. 1969); *United States ex rel Eckman* v. *Laird*, 430 F.2d 96, 99 (4th Cir. 1970); *Cohen* v. *Laird*, 315 F. Supp.

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[6] The hearing officer was a retired Kentucky Circuit Court judge with twenty-five years of experience on the trial bench (R.P. Vol. III 281). In addition to being the only person to have had an opportunity to carefully examine petitioner and other witnesses in person, he had before him the voluminous FBI file which included the full reports of all of the interviews (*ibid.* 252, 291). He also relied upon the opinions as to petitioner's sincerity of two individuals with whom he was personally familiar (A. 117a). In contrast, the appeal board was composed of laymen, it had no opportunity to see and hear petitioner or any of his witnesses in person, and it had only the brief resumé of the FBI investigation before it.

1265, 1277 (D.S.C. 1970). This error was compounded by the Department's erroneous legal advice with respect to the weight which these factors might be given by the appeal board. (See Pet. Br., pp. 39, 43-45).

CONCLUSION

For the reasons set forth above and in our main brief, the judgment of the Court of Appeals should be reversed and the case remanded to the District Court with instructions to dismiss the indictment.

Respectfully submitted,

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CLAY, AKA ALI *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 783. Argued April 19, 1971—Decided June 28, 1971

Petitioner appealed his local draft board's rejection of his application for conscientious objector classification. The Justice Department, in response to the State Appeal Board's referral for an advisory recommendation, concluded, contrary to a hearing officer's recommendation, that petitioner's claim should be denied, and wrote that board that petitioner did not meet any of the three basic tests for conscientious objector status. The Appeal Board then denied petitioner's claim, but without stating its reasons. Petitioner refused to report for induction, for which he was thereafter tried and convicted. The Court of Appeals affirmed. In this Court the Government has rightly conceded the invalidity of two of the grounds for denial of petitioner's claim given in its letter to the Appeal Board, but argues that there was factual support for the third ground. *Held:* Since the Appeal Board gave no reason for the denial of a conscientious objector exemption to petitioner, and it is impossible to determine on which of the three grounds offered in the Justice Department's letter that board relied, petitioner's conviction must be reversed. *Sicurella* v. *United States*, 348 U. S. 385.

430 F. 2d 165, reversed.

Chauncey Eskridge argued the cause for petitioner. With him on the briefs were *Jack Greenberg, James M. Nabrit III, Jonathan Shapiro,* and *Elizabeth B. DuBois.*

Solicitor General Griswold argued the cause for the United States. With him on the brief were *Assistant Attorney General Wilson* and *Beatrice Rosenberg.*

PER CURIAM.

The petitioner was convicted for willful refusal to submit to induction into the Armed Forces. 62 Stat. 622, as amended, 50 U. S. C. App. § 462 (a) (1964 ed., Supp.

V). The judgment of conviction was affirmed by the Court of Appeals for the Fifth Circuit.[1] We granted certiorari, 400 U. S. 990, to consider whether the induction notice was invalid because grounded upon an erroneous denial of the petitioner's claim to be classified as a conscientious objector.

I

The petitioner's application for classification as a conscientious objector was turned down by his local draft board, and he took an administrative appeal. The State Appeal Board tentatively classified him I–A (eligible for unrestricted military service) and referred his file to the Department of Justice for an advisory recommendation, in accordance with then-applicable procedures. 50 U. S. C. App. § 456 (j) (1964 ed., Supp. V). The FBI then conducted an "inquiry" as required by the statute, interviewing some 35 persons, including members of the petitioner's family and many of his friends, neighbors, and business and religious associates.

There followed a hearing on "the character and good faith of the [petitioner's] objections" before a hearing officer appointed by the Department. The hearing officer, a retired judge of many years' experience,[2] heard testimony from the petitioner's mother and father, from one of his attorneys, from a minister of his religion, and from the petitioner himself. He also had the benefit of a full report from the FBI. On the basis of this record the hearing officer concluded that the registrant

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[1] The original judgment of affirmance, 397 F. 2d 901, was set aside by this Court on a ground wholly unrelated to the issues now before us, *sub nom. Giordano* v. *United States*, 394 U. S. 310. Upon remand, the Court of Appeals again affirmed the conviction. 430 F. 2d 165.

[2] The hearing officer was Judge Lawrence Grauman, who had served on a Kentucky circuit court for some 25 years.

was sincere in his objection on religious grounds to participation in war in any form, and he recommended that the conscientious objector claim be sustained.[3]

Notwithstanding this recommendation, the Department of Justice wrote a letter to the Appeal Board, advising it that the petitioner's conscientious objector claim should be denied. Upon receipt of this letter of advice, the Board denied the petitioner's claim without a statement of reasons. After various further proceedings which it is not necessary to recount here, the petitioner was ordered to report for induction. He refused to take the traditional step forward, and this prosecution and conviction followed.

II

In order to qualify for classification as a conscientious objector, a registrant must satisfy three basic tests. He must show that he is conscientiously opposed to war in any form. *Gillette* v. *United States*, 401 U. S. 437. He must show that this opposition is based upon religious training and belief, as the term has been construed in our decisions. *United States* v. *Seeger*, 380 U. S. 163; *Welsh* v. *United States*, 398 U. S. 333. And he must show that this objection is sincere. *Witmer* v. *United States*, 348 U. S. 375. In applying these tests, the Selective Service System must be concerned with the registrant as an individual, not with its own interpretation of the dogma of the religious sect, if any, to which he may belong. *United States* v. *Seeger, supra*; *Gillette* v. *United States, supra*; *Williams* v. *United States*, 216 F. 2d 350, 352.

[3] Applicable regulations, 32 CFR § 1626.25 (1967 ed.), did not require that the hearing officer's report be transmitted to the Appeal Board, and the Government declined to disclose it to the petitioner. The statements in text are taken from the description of that report in the letter of advice from the Department of Justice, recommending denial of the petitioner's claim.

In asking us to affirm the judgment of conviction, the Government argues that there was a "basis in fact," cf. *Estep* v. *United States*, 327 U. S. 114, for holding that the petitioner is not opposed to "war in any form," but is only selectively opposed to certain wars. See *Gillette* v. *United States*, *supra*. Counsel for the petitioner, needless to say, takes the opposite position. The issue is one that need not be resolved in this case. For we have concluded that even if the Government's position on this question is correct, the conviction before us must still be set aside for another quite independent reason.

III

The petitioner's criminal conviction stemmed from the Selective Service System's denial of his appeal seeking conscientious objector status. That denial, for which no reasons were ever given, was, as we have said, based on a recommendation of the Department of Justice, overruling its hearing officer and advising the Appeal Board that it "finds that the registrant's conscientious-objector claim is not sustained and recommends to your Board that he be not [so] classified." This finding was contained in a long letter of explanation, from which it is evident that Selective Service officials were led to believe that the Department had found that the petitioner had failed to satisfy each of the three basic tests for qualification as a conscientious objector.

As to the requirement that a registrant must be opposed to war in any form, the Department letter said that the petitioner's expressed beliefs "do not appear to preclude military service in any form, but rather are limited to military service in the Armed Forces of the United States. . . . These constitute only objections to certain types of war in certain circumstances, rather than a general scruple against participation in war in any form. However, only a general scruple against partici-

pation in war in any form can support an exemption as a conscientious objector under the Act. *United States* v. *Kauten*, 133 F. 2d 703."

As to the requirement that a registrant's opposition must be based upon religious training and belief, the Department letter said: "It seems clear that the teachings of the Nation of Islam preclude fighting for the United States not because of objections to participation in war in any form but rather because of political and racial objections to policies of the United States as interpreted by Elijah Muhammad. . . . It is therefore our conclusion that registrant's claimed objections to participation in war insofar as they are based upon the teachings of the Nation of Islam, rest on grounds which primarily are political and racial."

As to the requirement that a registrant's opposition to war must be sincere, that part of the letter began by stating that "the registrant has not consistently manifested his conscientious-objector claim. Such a course of overt manifestations is requisite to establishing a subjective state of mind and belief." There followed several paragraphs reciting the timing and circumstances of the petitioner's conscientious objector claim, and a concluding paragraph seeming to state a rule of law—that "a registrant has not shown overt manifestations sufficient to establish his subjective belief where, as here, his conscientious-objector claim was not asserted until military service became imminent. *Campbell* v. *United States*, 221 F. 2d 454. *United States* v. *Corliss*, 280 F. 2d 808, *cert. denied*, 364 U. S. 884."

In this Court the Government has now fully conceded that the petitioner's beliefs *are* based upon "religious training and belief," as defined in *United States* v. *Seeger*, *supra*: "There is no dispute that petitioner's professed beliefs were founded on basic tenets of the Muslim reli-

gion, as he understood them, and derived in substantial part from his devotion to Allah as the Supreme Being. Thus, under this Court's decision in *United States* v. *Seeger*, 380 U. S. 163, his claim unquestionably was within the 'religious training and belief' clause of the exemption provision."[4] This concession is clearly correct. For the record shows that the petitioner's beliefs are founded on tenets of the Muslim religion as he understands them. They are surely no less religiously based than those of the three registrants before this Court in *Seeger*. See also *Welsh* v. *United States*, 398 U. S. 333.

The Government in this Court has also made clear that it no longer questions the sincerity of the petitioner's beliefs.[5] This concession is also correct. The Department hearing officer—the only person at the administrative appeal level who carefully examined the petitioner and other witnesses in person and who had the benefit of the full FBI file—found "that the registrant is sincere in his objection." The Department of Justice was wrong in advising the Board in terms of a purported rule of law that it should disregard this finding simply because of the circumstances and timing of the petitioner's claim. See *Ehlert* v. *United States*, 402 U. S. 99, 103–104; *United States ex rel. Lehman* v. *Laird*, 430 F. 2d 96, 99; *United States* v. *Abbott*, 425 F. 2d 910, 915; *United States ex rel. Tobias* v. *Laird*, 413 F. 2d 936, 939–940; *Cohen* v. *Laird*, 315 F. Supp. 1265, 1277–1278.

Since the Appeal Board gave no reasons for its denial of the petitioner's claim, there is absolutely no way of knowing upon which of the three grounds offered in the Department's letter it relied. Yet the Government now acknowledges that two of those grounds were not valid.

[4] Brief for the United States 12.

[5] "We do not here seek to support the denial of petitioner's claim on the ground of insincerity . . . ." *Id.*, at 33.

And, the Government's concession aside, it is indisputably clear, for the reasons stated, that the Department was simply wrong as a matter of law in advising that the petitioner's beliefs were not religiously based and were not sincerely held.

This case, therefore, falls squarely within the four corners of this Court's decision in *Sicurella* v. *United States*, 348 U. S. 385. There as here the Court was asked to hold that an error in an advice letter prepared by the Department of Justice did not require reversal of a criminal conviction because there was a ground on which the Appeals Board might properly have denied a conscientious objector classification. This Court refused to consider the proffered alternative ground:

> "[W]e feel that this error of law by the Department, to which the Appeal Board might naturally look for guidance on such questions, must vitiate the entire proceedings at least where it is not clear that the Board relied on some legitimate ground. Here, where it is impossible to determine on exactly which grounds the Appeal Board decided, the integrity of the Selective Service System demands, at least, that the Government not recommend illegal grounds. There is an impressive body of lower court cases taking this position and we believe that they state the correct rule." *Id.*, at 392.

The doctrine thus articulated 16 years ago in *Sicurella* was hardly new. It was long ago established as essential to the administration of criminal justice. *Stromberg* v. *California*, 283 U. S. 359. In *Stromberg* the Court reversed a conviction for violation of a California statute containing three separate clauses, finding one of the three clauses constitutionally invalid. As Chief Justice Hughes put the matter, "[I]t is impossible to say under which clause of the statute the conviction was obtained." Thus, "if any of the clauses in question is invalid under the

Federal Constitution; the conviction cannot be upheld." *Id.*, at 368.

The application of this doctrine in the area of Selective Service law goes back at least to 1945, and Judge Learned Hand's opinion for the Second Circuit in *United States* v. *Cain*, 149 F. 2d 338. It is a doctrine that has been consistently and repeatedly followed by the federal courts in dealing with the criminal sanctions of the selective service laws. See, *e. g.*, *United States* v. *Lemmens*, 430 F. 2d 619, 623–624 (CA7 1970); *United States* v. *Broyles*, 423 F. 2d 1299, 1303–1304 (CA4 1970); *United States* v. *Haughton*, 413 F. 2d 736 (CA9 1969); *United States* v. *Jakobson*, 325 F. 2d 409, 416–417 (CA2 1963), aff'd *sub nom. United States* v. *Seeger*, 380 U. S. 163; *Kretchet* v. *United States*, 284 F. 2d 561, 565–566 (CA9 1960); *Ypparila* v. *United States*, 219 F. 2d 465, 469 (CA10 1954); *United States* v. *Englander*, 271 F. Supp. 182 (SDNY 1967); *United States* v. *Erikson*, 149 F. Supp. 576, 578–579 (SDNY 1957). In every one of the above cases the defendant was acquitted or the conviction set aside under the *Sicurella* application of the *Stromberg* doctrine.

The long established rule of law embodied in these settled precedents thus clearly requires that the judgment before us be reversed.

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, concurring.

I would reverse this judgment of conviction and set the petitioner free.

In *Sicurella* v. *United States*, 348 U. S. 385,[1] the wars

[1] As to the Court's analysis of *Sicurella* v. *United States*, 348 U. S. 385, and its application of *Stromberg* v. *California*, 283 U. S. 359, little need be said. The Court is, of course, quite accurate if

that the applicant would fight were not "carnal" but those "in defense of Kingdom interests." *Id.*, at 389. Since it was impossible to determine on exactly which grounds the Appeal Board had based its decision, we reversed the decision sustaining the judgment of conviction. We said: "It is difficult for us to believe that the Congress had in mind this type of activity when it said the thrust of conscientious objection must go to 'participation in war in any form.'" *Id.*, at 390.

In the present case there is no line between "carnal" war and "spiritual" or symbolic wars. Those who know the history of the Mediterranean littoral know that the *jihad* of the Moslem was a bloody war.

This case is very close in its essentials to *Negre* v. *Larsen*, 401 U. S. 437, decided March 8, 1971. The church to which that registrant belonged favored "just" wars and provided guidelines to define them. The church did not oppose the war in Vietnam but the registrant refused to comply with an order to go to Vietnam because participating in that conflict would violate his conscience. The Court refused to grant him relief as a conscientious objector, overruling his constitutional claim.

The case of Clay is somewhat different, though analogous. While there are some bits of evidence showing conscientious objection to the Vietnam conflict, the basic objection was based on the teachings of his religion. He testified that he was

"sincere in every bit of what the Holy Qur'an and

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opposition to "war in any form" as explained in *Gillette* v. *United States*, and *Negre* v. *Larsen*, 401 U. S. 437, is the law. But in my view the ruling in *Gillette* and *Negre* was unconstitutional. Hence of the three possible grounds on which the Board denied conscientious objector status, none was vaild.

> the teachings of the Honorable Elijah Muhammad tell us and it is that we are not to participate in wars on the side of nobody who—on the side of nonbelievers, and this is a Christian country and this is not a Muslim country, and the Government and the history and the facts shows that every move toward the Honorable Elijah Muhammad is made to distort and is made to ridicule him and is made to condemn him and the Government has admitted that the police of Los Angeles were wrong about attacking and killing our brothers and sisters and they were wrong in Newark, New Jersey, and they were wrong in Louisiana, and the outright, every day oppressors and enemies are the people as a whole, the whites of this nation. So, we are not, according to the Holy Qur'an, to even as much as aid in passing a cup of water to the—even a wounded. I mean, this is in the Holy Qur'an, and as I said earlier, this is not me talking to get the draft board—or to dodge nothing. This is there before I was borned and it will be there when I'm dead but we believe in not only that part of it, but all of it."

At another point he testified: "[T]he Holy Qur'an do teach us that we do not take part of—in any part of war unless declared by Allah himself, or unless it's an Islamic World War, or a Holy War, and it goes as far—the Holy Qur'an is talking still, and saying we are not to even as much as aid the infidels or the nonbelievers in Islam, even to as much as handing them a cup of water during battle."

"So, this is the teachings of the Holy Qur'an before I was born, and the Qur'an, we follow not only that part of it, but every part."

The Koran defines *jihad* as an injunction to the believers to war against nonbelievers: [2]

> "O ye who believe! Shall I guide you to a gainful trade which will save you from painful punishment? Believe in Allah and His Apostle and carry on warfare (*jihad*) in the path of Allah with your possessions and your persons. That is better for you. If ye have knowledge. He will forgive your sins, and will place you in the Gardens beneath which the streams flow, and in fine houses in the Gardens of Eden: that is the great gain." M. Khadduri, War and Peace in the Law of Islam 55–56 (1955).

The Sale edition of the Koran, which first appeared in England in 1734, gives the following translation at 410–411 (9th ed. 1923):

> "Thus God propoundeth unto men their examples. When ye encounter the unbelievers, strike off their heads, until ye have made a great slaughter among them; and bind them in bonds; and either give them a free dismission afterwards, or exact a ransom; until the war shall have laid down its arms. This shall ye do. Verily if God pleased he could take vengeance on them, without your assistance; but he commandeth you to fight his battles, that he may prove the one of you by the other. And as to those who fight in defence of God's true religion, God will not suffer their works to perish: he will guide them, and will dispose their heart aright; and

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[2] Koran 61:10–13.

"War, then, is here an integral part of the legal system; for in accordance with the doctrine of the *jihad*, which is recognized as 'the peak of religion,' the Islamic commonwealth must be expanding relentlessly, like a caravan continuously on the move, until it becomes coterminous with humanity, at which time war will have been transposed into universal peace." A. Bozeman, The Future of Law in a Multicultural World 81–82 (1971).

> he will lead them into paradise, of which he hath told them. O true believers, if ye assist God, by fighting for his religion, he will assist you against your enemies; and will set your feet fast. . . ."

War is not the exclusive type of *jihad;* there is action by the believer's heart, by his tongue, by his hands, as well as by the sword. War and Peace in the Law of Islam 56. As respects the military aspects it is written:

> "The *jihad,* in other words, is a sanction against polytheism and must be suffered by all non-Muslims who reject Islam, or, in the case of the dhimmis (Scripturaries), refuse to pay the poll tax. The *jihad,* therefore, may be defined as the litigation between Islam and polytheism; it is also a form of punishment to be inflicted upon Islam's enemies and the renegades from the faith. Thus in Islam, as in Western Christendom, the *jihad* is the *bellum justum.*" *Id.,* at 59.

The *jihad* is the Moslem's counterpart of the "just" war as it has been known in the West.[3] Neither Clay nor Negre should be subject to punishment because he will not renounce the "truth" of the teaching of his respective church that wars indeed may exist which are just wars in which a Moslem or Catholic has a respective duty to participate.

What Clay's testimony adds up to is that he believes only in war as sanctioned by the Koran, that is to say, a religious war against nonbelievers. All other wars are unjust.

That is a matter of belief, of conscience, of religious principle. Both Clay and Negre were "by reason of reli-

[3] The last attempt to use the *jihad* as a significant force was made in 1914 by the Ottoman sultan; but it failed and the *jihad* has fallen into disuse. See 1 A. Toynbee, Survey of International Affairs, 1925, p. 43 *et seq.* (1927); 8 Encyclopaedia of the Social Sciences 401–403 (1932).

gious training and belief" conscientiously opposed to participation in war of the character proscribed by their respective religions. That belief is a matter of conscience protected by the First Amendment which Congress has no power to qualify or dilute as it did in § 6 (j) of the Military Selective Service Act of 1967, 50 U. S. C. App. § 456 (j) (1964 ed., Supp. V) when it restricted the exemption to those "conscientiously opposed to participation in war in any form." For the reasons I stated in *Negre* and in *Gillette* v. *United States*, 401 U. S. 437, that construction puts Clay in a class honored by the First Amendment, even though those schooled in a different conception of "just" wars may find it quite irrational.

I would reverse the judgment below.

MR. JUSTICE HARLAN, concurring in the result.

I concur in the result on the following ground. The Department of Justice advice letter was at least susceptible of the reading that petitioner's proof of sincerity was insufficient as a matter of law because his conscientious objector claim had not been timely asserted. This would have been erroneous advice had the Department's letter been so read. Since the Appeals Board might have acted on such an interpretation of the letter, reversal is required under *Sicurella* v. *United States*, 348 U. S. 385 (1955).